No. 64.

Reply Brief of McIntosh

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Supreme Court of the United States,

OCTOBER TERM, 1900.

Filed Oct. 1, 1900.

No. 64.

THE SOUTHERN RAILWAY COMPANY,

PLAINTIFF IN ERROR,

vs.

THE POSTAL TELEGRAPH-CABLE COMPANY,

DEFENDANT IN ERROR.

Error to the United States Circuit Court of Appeals,

FOURTH CIRCUIT.

REPLY BRIEF

FOR DEFENDANT IN ERROR,

BY

J. R. McINTOSH,

Counsel for Defendant in Error.

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IN THE

Supreme Court of the United States,

No 64.

SOUTHERN RAILWAY COMPANY,
PLAINTIFF IN ERROR.

VS.

POSTAL TELEGRAPH-CABLE COMPANY,
DEFENDANT IN ERROR.

In Error to the United States Circuit Court of Appeals, Fourth Circuit.

Reply Brief for Defendant in Error by J. R. McIntosh.

THE CASE STATED.

This was a special proceeding instituted by defendant in error in the Superior Court of Guilford county, North Carolina, to condemn so much of the right of way of the plaintiff in error, in that State, necessary for the construction, maintenance, and operation of its telegraph lines thereon, through the several counties and for the distance specified in its petition of the 11th day of June, 1898 (record, pp. 3–6). and amended petition filed the same day (record, pp. 18–21)

(1) The original petition alleged that the petitioner (the defendant in error) was a corporation duly incorporated under the laws of the State of New York, with authority to construct, maintain, and operate telegraph lines throughout the State of New York and the other States of the United States of America, including the State of North Carolina; and by virtue of Chap. 49 of the Code of North Carolina of 1883, and the Acts of the General Assembly of said State amendatory thereof, desired to construct, maintain, and operate a line of telegraph along and upon the right of way of the Southern Railway Company, from a point on the State line between the States of North Carolina and Virginia, where said railroad right of way crosses said State line; thence through the counties of Rockingham, Guilford, Randolph, Davidson, Rowan, Cabarras, and Mecklenburg, to the town of Charlotte, in the last-named county; and from the town of Greensboro, in the said county of Guilford, to the city of Raleigh, in said State, passing through the counties of Guilford, Alamance, Orange, Durham, and Wake, the whole distance being 193 miles.

(2) That when constructed, it would connect with telegraph lines already constructed, owned and operated by petitioner, and others to be constructed, owned and operated by it, making complete telegraph connections throughout the United States of America, Canada, and Mexico, with cable connections with Europe.

(3) That it failed, on application therefor, to secure by contract or agreement the right to erect its telegraph lines on the right of way aforesaid of the Railway Company, and that it has given security for the cost of the proceeding.

(4) That the defendant Railway Company extends to and runs within the town of Greensboro, in the said county of Guilford, and has an agent located therein.

(5) That it desired to construct its telegraph line upon the west side of the line of track of said railroad, from the town of Charlotte aforesaid to the said State line, and on the south

side of said railroad track from said town of Greensboro to the city of Raleigh; and to erect its poles along the outer edge of said right of way, about four feet from the said outer edge of said right of way, unless it be that at some points of said right of way at that distance from said outer edge there be found obstructions which would prevent the erection of said poles at such points; then in such event petitioner proposes to erect said poles as near said outer edge of said right of way as can be done without any interference with any other line of telegraph or any other obstruction on said right of way.

(6) That the defendant Railway Company (plaintiff in error) is a single line, with a railroad bed constructed at or near the center of its right of way, with its track about 4 feet 8½ inch guage, and has such switches, turn-outs, stations, side-tracks, turn-tables, water-tanks, &c., as is necessary to carry on and operate a single line of railway; that the right of way of said railway is about 100 feet wide, and extends about 50 feet from a line along the center of said rails of said main track.

(7) That the line of telegraph to be constructed by petitioner would be of the best material, and upon the most improved plan, with poles about 26 feet in length, and 1 foot in diameter at the base, and firmly planted in the ground at a depth of not less than 5 feet; and upon such poles would be attached suitable cross-arms about 6 feet in length, fastened near the top of said poles with insulators thereon, on which would be strung, at or near the upper end wires of suitable material and number, to enable petitioner (defendant in error) to promptly transmit all telegraph messages entrusted to it; that there would be about 35 poles to the mile.

(8) That in places where its lines would cross the track, to prevent any interference with any work, use or obstruction, or the operation of any trains of said Railway Company, the poles would be so high above the ground as to permit its wires to be suspended so far above any structure of defendant company (plaintiff in error) as to prevent any interference therewith.

(9) That said cross-arms would extend the same distance on each side of the said poles; that said poles would be so erected, and said telegraph line so constructed and maintained, as not to obstruct or hinder the usual travel and business of said Railway Company, nor in any way interfere with the operations of said company, nor with any telegraph lines now constructed on said right of way.

(10) And in the event said Railway Company (plaintiff in error) should express a desire for the location of said line at some other points on said right of way, than as designated above, or in the event said Railway Company should at any time desire to change the location of its tracks, or construct new tracks or side-tracks where the same do not now exist, the petitioner agrees to remove said poles to such other points on said right of way adjacent thereto, as shall be designated by said Railway Company, upon reasonable notice, and at the expense of petitioner (defendant in error).

(11) That petitioner would not construct its lines, or in any way attach the same to any of the trestle work or bridges of said Railway Company, or upon any of its enbankments.

(12) That said telegraph lines when constructed would in no way damage the property of said railway company or impair or injure the value of said right of way for railroad purposes, but that the same would be beneficial to said railway company and its patrons.

(13) That defendant railway company (plaintiff in error) is duly incorporated and doing business by virtue of its charter, with a right of way 100 feet in width, obtained by enactments of the General Assembly of this State for railroad purposes alone.

(14) That petitioner does not desire by this proceeding to secure the fee to any part of the right of way of said defendant railway company (plaintiff in error) but only to obtain the right to construct, maintain and operate over, along and upon the right of way of said railway company, a telegraph line as aforesaid.

(15) That petitioner prays for the rights and privileges hereinbefore enumerated, for the bona fide purpose of obtaining said easement and right of way, in order to erect, maintain and operate the telegraph line for the benefit and accommodation of the general public; and that a copy of the petition, with notice of time and place be served upon the defendant (plaintiff in error) when the same shall be presented to the Superior Court at least ten days prior to the presentation of the same to the court, and that such proceedings be had and orders made and judgments entered, as are in such cases provided for by statute. Which petition was sworn to.

The amended petition (amended by order of the court, see record, pp. 18–21) has the following allegation:

"And the said Postal Telegraph-Cable Company has, as required by section 5268 of the Revised Statutes of the United States, filed its written acceptance with the Postmaster General of the United States, of all restrictions and obligations imposed by Acts of Congress approved July 24, 1866, entitled 'An Act to aid in the construction of telegraph lines and to secure to the government the use of the same for military purposes;' and by inserting the following: 'From the town of Greensboro to the town of Winston, in the county of Forsyth.'"

On the 22nd day of June, 1898, the plaintiff in error filed a petition for removal to the United States Circuit Court for the Western District of North Carolina (record pp. 7–8) in which it is alleged that the matter in controversy therein exceeds, exclusive of interest and costs, the sum or value of $2,000, and that the suit is of a civil nature, and that it is a controversy wholly between citizens of different States, which can be fully determined as between them, to-wit: a controversy between petitioner (plaintiff in error), which was at the commencement of this action, and still is, a citizen and resident of the State of Virginia, and the Postal Telegraph-Cable Company, a citizen and resident of the State of New York; together with bond (record, pp. 8–9) for removal.

The Superior Court of Guilford county, North Carolina, in which defendant in error had instituted its proceeding, and before which the application for removal was made, overruled and denied said application for removal, the Court in its judgment denying said application, using the following language:

"The motion of the Southern Railway Company for removal of said cause to the Circuit Court of the United States for the Western District of the State of North Carolina, coming on to be heard by the Court, upon the papers filed, is hereby overruled.

"The Court holding that the amount in controversy is not shown by the pleadings in said cause to be as much as $2,000, and from the fact stated in the petition of the Postal Telegraph-Cable Company, the Court is of the opinion that the amount of damages to which the railroad is entitled from the Telegraph Company, for the rights and privileges set out in said petition, is less than $2,000. Said defendant railway company is given twenty days within which to file its answer with the Clerk of this Court, to the petition of the said Telegraph Company." (Record, pp. 9–10.)

Whereupon the plaintiff in error procured a restraining order from His Honor, Charles H. Simonton, restraining and enjoining the petitioner (defendant in error) from further proceeding in the State Court.

Subsequently the cause was heard on motion by the defendant in error to remand said cause to the State Court, and for, and on the part of, the plaintiff in error to perpetuate the injunction, before His Honor, Charles H. Simonton, at Asheville, North Carolina, when, in an opinion of July 20, 1898, he continued the restraining order until the further order of the court, and refused to remand the cause to the State Court. (Record, pp. 21–24.) The orders of the court thereon, are upon pages 24–25 of the record.

On the 18th day of August, 1898, and after the court had refused to remand the cause, and continued the restraining

rder, the defendant in error filed a petition before His Honor, harles H. Simonton, reciting the petition that it had filed in he Superior Court of the State of North Carolina; its removal o this court; that it was chartered under the laws of New ork, with authority to construct, maintain and operate its nes throughout the United States, including the State of orth Carolina, and had complied with the Acts of Congress f July 24, 1866, and the Revised Statutes 5263 to 5269, and as therefore, authorized to construct its telegraph lines on all ost roads; that said Railway Company's right of way, under he Acts of Congress, was a post road; and that said Telegraph ompany owns and operates connecting telegraph lines hroughout the United States and Canada, with connecting able lines across the Atlantic Ocean; and that it already has nd operates telegraph lines in the said State of North Caro-na; and that the line now proposed to be erected on the right f way of said defendant Railway Company in said State, will onnect with its said lines heretofore constructed in said State, hereby making it a part of the great system of its lines ex-ending through the United States as aforesaid; and that it is ngaged in interstate commerce; that the Railway Company ill not be damaged by the construction and maintenance of etitioner's telegraph line in the manner set out in the petition, nd that it is entitled to only nominal damages for the use of o much of its right of way for its purposes, as prayed for in he petition; that nominal damages to said Railway Company ill be just compensation, for such use.

That under the Acts of Congress aforesaid, it is entitled to he right, without obstruction, hinderance, or delay to con-ruct its telegraph lines as prayed for in the said petition; and rays an order from the court authorizing it to proceed at once ithout delay to construct its lines as prayed for in its petition, pon the execution of a bond to be approved by the court, or lerk, as the court may deem necessary to fully protect the ghts and interests of the Railway Company, conditioned to ay such damages to the Railway Company as may be finally

adjudged against it in said condemnation proceedings (record, pp. 34–35); which petition was by the court overruled, and commissioners directed to be appointed to assess the damages under section 1945 of the North Carolina Code. (See opinion of the court, Sept. 9, 1898, record, pp. 26–33.) And afterwards, on the 15th September, 1898, his Honor Judge Charles H. Simonton, made an order directing S. L. Trogdon, clerk of the United States Court at Greensboro, North Carolina, to appoint three disinterested and competent freeholders, resident in the district, and summon them before him as commissioners to assess the damages which the Southern Railway Company would sustain by reason of the erection of the telegraph poles, and the stretching of the wires thereon, of the Postal Telegraph-Cable Company, as proposed in the petition of said Company to the court, (record, p. 36); to which order of the court plaintiff in error filed bill of exceptions No. 2 (pp. 39–40 of the record).

Afterwards, on the 23d day of September, 1898, his Honor Charles H. Simonton, on application of plaintiff in error for leave to file its answer to the petition filed by defendant in error, ordered that the defendant in error be required to show cause before him at Charleston, in the United States court-room, on the 7th of October next thereafter, why the defendant should not have leave to file its answer as prayed for, and the former order for the appointment of commissioners be vacated and annulled, and that said order be suspended until the further order of the court.

And on the 12th day of October, 1898, plaintiff in error was, by order of the court, permitted to file its answer to the petition of defendant in error, filed in the Superior Court of Guilford county, North Carolina (record, pp. 41–54), to which answer defendant in error filed a demurrer the same day (record, pp. 54–55).

Which demurrer was by the court sustained; the opinion of the court (record, pp. 56–58), filed October 18, 1898; and the former order for the appointment of commissioners reinstated

ober 24, 1898 (record, pp. 58–59); to which order plaintiff error filed bill of exceptions November 14, 1898 (record, 2); and on the 24th day of October, 1898, the court made order making defendant's exceptions a part of the record cord, pp. 63–4).

On November 3, 1898, plaintiff in error filed notice of appeal he defendant in error, as follows: "Please take notice that Southern Railway Company, the defendant above named, eals from the order made in the above entitled cause by Honor, Charles H. Simonton, on October 24, 1898, which er sustains the plaintiff's demurrer to the answer of the endant, and denies the defendant the right to take testiny, and reinstates the order of September 15, 1898, direct- the clerk to appoint commissioners, &c., as will fully ear from said order.

Defendant also appeals from all prior and intermediate ers in said cause." (Record, p. 64.)

On the 14th day of November, 1898, plaintiff in error ved notice upon the defendant in error that it had directed clerk of the United States Circuit Court for the Western trict of North Carolina, at Greensboro, to enter upon the gment docket or other proper order book of said court, t in the condemnation case of Postal Telegraph-Cable mpany against Southern Railway Company, the defendant ealed from the order of the court entered on the 24th day October, 1898, which order sustained the plaintiff's demur- to the defendant's answer to the petition of the plaintiff, l said defendant's right to take testimony in support of the l answer, and reinstates the order of September 15, 1898, ecting said clerk to appoint commissioners to fix compenion to be paid defendant for damages resulting from the ction by the plaintiff of a telegraph line upon its right of y, &c. (Record, p. 65.)

And on November 4, 1898, plaintiff in error presented to s Honor, Judge Charles H. Simonton, a petition for a writ error addressed to the Honorable Judges of the Circuit

Court of the United States for the Western District of North Carolina, alleging that it felt itself aggrieved by the order made by the court on the 24th day of October, 1898, particularly described in its assignment of errors; also by orders made by the said Circuit Court, dated August 31, 1898, and September 15, 1898, and by two orders of the clerk of the Circuit Court of the United States at Greensboro, dated respectively September 19, 1898, and September 24, 1898, saying: "does hereby appeal from said order of the Circuit Court, dated October 24, 1898 (and all of the above recited orders of said Circuit Court and the clerk thereof) to the United States Circuit Court of Appeals, Fourth Circuit, for the reasons set out and specified in the assignment of errors filed herewith; and your petitioner prays that a writ of error may be allowed it; that a transcript of the orders, proceedings and all papers made and duly authenticated, may be sent to the United States Circuit Court of Appeals for the Fourth Circuit; and that said orders of October 24, 1898, and all the other aforesaid orders, may be reviewed and reversed by the United States Circuit Court of Appeals." (Record, p. 66.)

Plaintiff in error, at the same time, filed an assignment of errors. (Record, pp. 67–72.)

Afterwards, on the 9th day of November, 1898, His Honor, Charles H. Simonton delivered an opinion refusing the writ of error to plaintiff in error (record, pp. 72–3), and entered an order to that effect (record, p. 74); and on the same day reinstated the order of September 15, providing for the appointment of commissioners to assess the damages (record, p. 75.)

On the 29th day of November, 1898, His Honor, Nathan Goff, United States Circuit Judge, made an order setting aside the order of the 9th of November, 1898, made by His Honor, Charles H. Simonton, who had heard the cause, and refused to allow the plaintiff in error a writ of error and *supersedeas*, provided the defendant, within ten days, filed in the papers of the cause a bond in the penalty of $1,000, as provided by law,

surety to be approved by one of the judges of the court. ord, p. 80.)

n February 6th, 1889, defendant in error filed a motion in Circuit Court of Appeals for the Fourth Circuit, to dismiss writ of error, as granted improvidently to an order which interlocutory, and not final. (Record, pp, 92–3.)

his motion was by said court sustained. (Opinion of his or, Judge Morris for the court, record, pp. 94, 95, 96 and and judgment of the Circuit Court of Appeals by his or, Judge Nathan Goff, March 31st, 1899, record, page 98.)

nd afterwards, to-wit, on the 1st day of April, 1899, the date of the said Circuit Court of Appeals was issued and smitted to the Circuit Court of the United States for the stern District of North Carolina, at Greensboro. (Record, 98, 99, 100.)

ursuant to said mandate, with the orders of the court eon, assessment of damages to which the plaintiff in error entitled from the defendant in error was made at Greens-, N. C., on the 21st day of April, 1899. A certified copy aid proceedings, together with a receipt of the clerk of said court to the Postal Telegraph-Cable Company, show- that the amount assessed against the defendant in error was l to the said clerk for the Railway Company, has been filed n the clerk of this court.

fterwards, to-wit, May 3rd, 1899, petition for writ of error n *supersedeas* in the United States Circuit Court of Appeals the Fourth Circuit to the Honorable Judges of the said rt of Appeals was filed by the plaintiff in error (record, 101, 102). At the same time assignment of errors was l by the plaintiff in error in said court (record, pp. 102, , 104, 105 and 106). Writ of error was allowed by his nor, Nathan Goff, United States Circuit Judge, on the 3rd of May, 1899 (record, p. 106), and approved by the Hon. ville W. Fuller, Chief Justice, May 5th, 1899 (record, pp. -108). Afterwards the defendant in error entered a motion the Supreme Court of the United States, October term,

1898, in said cause, at the said term, being No. 303, to dismiss the writ of error in said cause, "(1) because this court has no jurisdiction of the same; (2) if the motion is not sustained, then that the *supersedeas* upon the writ of error from this court be modified, so that during the pendency of the writ it will not prevent or hinder the defendant in error from occupying the premises appropriated for its use and proceeding to erect and operate its line of telegraph thereon pending said writ of error." And on the 30th day of October, 1899, this honorable court made an order denying the motion to dismiss, and vacating the *supersedeas* on writ of error from this Court.

I cannot believe this court, by its order of October 30th, 1899, adjudicated the order of Judge Simonton, of October 24th, 1898, to be a final order, but made the order discharging the *supersedeas*, and merely passed the motion to dismiss, for further consideration, when the case is regularly reached upon the docket. I, therefore, respectfully renew the motion to dismiss the writ of error, on the ground that this court has no jurisdiction of the appeal, and, also, respectfully submit an argument for defendant in error, upon the merits as presented by the record in the cause.

Motion to Dismiss.

In support of this motion, on the ground that the order of his Honor, Judge Simonton, of October 24th, 1898, is not a final order, I here copy the opinion of Judge Morris for the Circuit Court of Appeals, sustaining motion of defendant in error, as a conclusive argument upon that point:

Opinion of Judge Morris.

"The rule that a writ of error or appeal does not lie except to a final judgment which determines the controversy between the parties, is so conclusively settled that the burden is upon the plaintiff in error to show that this is a case to which that general rule does not apply.

"The contention of the plaintiff in error is that it is not ap-

from the order appointing commissioners, but from
n of the court below in refusing to allow it to intro-
timony to sustain its contention that the proposed tel-
ne could not be so constructed and operated as not to
and hinder the usual travel upon the railroad.
ontention is that in an adversary proceeding in court
emnation there are two separate and successive pro-
, the first of which determines the right to condemn,
second the amount of compensation; and that the
hese, even when the right to condemn is sustained, is
nd appealable judgment, although not made so by

e can be found no case in the decisions of the Su-
ourt of the United States which has so held. In the
Belmont Bridge v. *Wheeling Bridge*, 138 U. S., 287,
reme Court did hold that the judgment in that case
condemnation was a final appealable judgment, but
solely upon the ground that the case came to the Su-
ourt by writ of error to the Supreme Court of Appeals
Virginia, and that it had been held by that court that
gment was final under the West Virginia statute.
tice Field said: 'The judgment appears to have been
ed as so far final as to justify an appeal from it;
he supreme court of a State holds a judgment of an
court of the State to be final, we can hardly consider
other light in exercising an appellate jurisdiction.'
Luxton v. *North River Bridge Co.*, 147 U. S., 337–342,
tice Gray, commenting on the ruling in the case just
noted, said: 'To have held otherwise might have wholly
the appellate jurisdiction of this court under the Con-
and laws of the United States; for if the highest
the State held the order appointing commissioners to
and conclusive unless appealed from, and the validity
ondemnation not to be open on a subsequent appeal
e award of damages, it is difficult to see how this court
ave reached the question of the validity of the con-

demnation except by writ of error to the order appointing commissioners. That case, therefore, affords no precedent or reason for sustaining this writ of error to the Circuit Court of the United States.'

"Even if the fact was pertinent, in condemnation proceedings under the provisions of the State law when conducted in a circuit court of the United States, that the State court had held the appointment of commissioners to be a final appealable order, the plaintiff in error cannot have the benefit of such a contention in the present case, for the reason that the Supreme Court of North Carolina has decided to the contrary with respect to the very statute under which these proceedings were taken. *American Union Telegraph Co.* v. *Wilmington, &c. Railroad Company*, 83 N. C., 420, the Supreme Court of North Carolina held, in a similar proceeding to condemn a right of way for the construction and operation of lines of telegraph along the defendant's railroad, that no appeal was allowable from the order adjudging that the petitioner was entitled to the right of way demanded and appointing commissioners to ascertain and report the compensation to be paid to the defendant railroad as damages for the condemned property. The court said: 'Upon a careful examination of the statute, and the portions of the act of February 8, 1872, by reference incorporated with it, and regarding the policy indicated in both to favor the construction and early completion of such works of internal improvement, telegraphic being upon the same footing as railroad corporations, we are of opinion it was not intended in these enactments to arrest the proceedings authorized by them at any intermediate stage, and the appeal lies only from a final judgment. Then and not before may any error committed during the progress of the cause and made the subject of exception at the time, be reviewed and corrected in the appellate court, and an appeal from an interlocutory order is premature and unauthorized.'

"In *Hendrick* v. *Railroad*, 98 N. C., 431, the supreme court of North Carolina again held that under the law of that State

the order appointing commissioners to assess damages is interlocutory, and no appeal will be entertained until after final judgment upon the report of the commissioners, and said: 'This case is in all material respects like *Telegraph Company* v. *The R. R. Co.*, 83 N. C., 420; *Commissioners* v. *Coon*, 86 N. C., 18; *Railroad* v. *Warren*, 92 N. C., 620. They settle the course of practice in such proceedings as the present one and sufficiently state the reasons for it.'

"The case of *Luxton* v. *North River Bridge Co.*, 147 U. S., 337–341, above cited, is, we think, conclusive of the present question, for in that case it was held by the Supreme Court of the United States that although the proceedings in the Circuit Court of the United States were directed by the act of Congress to be according to the laws of the State within which the land to be condemned was located, and by that State law the appointment of the commissioners could be reviewed by the Supreme Court of the State on writ of *certiorari*, yet so much of the State law as allowed such review was inapplicable to a proceeding in the Circuit Court of the United States. The court said: 'The case throughout, from the application of the corporation for the appointment of commissioners to assess damages to the owner of the land proposed to be taken, until judgment upon the award of the commissioners or upon verdict of a jury, assessing those damages, remains in the Circuit Court of the United States and under its supervision and control. The action of that court in this case, as in other cases on the common-law side, is not reviewable by this court by writ of *certiorari*. *United States* v. *Young*, 94 U. S., 258; but only by writ of error, which does not lie until after judgment disposing of the whole case and adjudicating all the rights, whether of title or of damages, involved in the transaction. The case is not to be sent up in fragments by successive writs of error.

"Act of September 24, 1789, ch. 20, sec. 22, 1 Stat., 84. Rev. Stat., sec. 691.

"*Rutherford* v. *Fisher*, 4 Dall., 22.

" *Halcombe* v. *McKusick*, 20 How., 552, 554.
" *Louisiana Bank* v. *Whitney*, 121 U. S., 284.
" *Keystone Co.* v. *Martin*, 132 U. S., 91.
" *McGourkey* v. *Toledo & Ohio Railway*, 146 U. S., 536."

ASSIGNMENT OF ERRORS.

The plaintiff in error, in its assignment of errors filed in this cause, May 3rd, 1898 (record, pp. 102–106), assigns as error, " the orders entered in this suit, to-wit, said order entered by said Circuit Court of Appeals, dated March 31st, 1899, and the orders entered by said Circuit Court, dated August 31st, 1898, September 15th, 1898, and October 24th, 1898, and the orders entered by the Clerk of said Circuit Court, dated September 19th, 1898, and October 24th, 1898.

I respectfully submit that neither one of the said several orders is, within itself, a *final order*, and hence the whole together cannot constitute a final order.

ORDER OF CIRCUIT COURT OF APPEALS, OF MARCH 31, 1899.

The order of the Circuit Court of Appeals, of March 31st, 1899, is as follows:

JUDGMENT.

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT.

Southern Railway Company,
Plaintiff in error,
v.
Postal Telegraph-Cable Company,
Defendant in error.
} No. 298.

Error to the Circuit Court of the United States for the western district of North Carolina, at Greensboro.

This cause having been called in the regular order for argument and the defendant in error having moved the court to dismiss the writ of error, the said cause was argued generally, by counsel, on the transcript of the record as well as upon the motion to dismiss.

On consideration whereof, the court being of opinion that there was no final judgment of the said Circuit Court in this cause from which a writ of error could lie, it is now here ordered and adjudged by this court that the writ of error sued out in this cause be, and the same is hereby, dismissed with costs.

Let mandate issue.

NATHAN GOFF.

March 31, 1899.

Order entered by Circuit Court, dated August 31st, 1898:

ORDER OVERRULING DEMURRER.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA.

The Postal Telegraph–Cable Company,
v.
The Southern Railway Company.

This cause came before me at Asheville, to be heard on the petition removed into this court and demurrer thereon: it is ordered, adjudged and decreed that the demurrer be overruled.

CHARLES H. SIMONTON,

31st August, 1898. *Circuit Judge.*

Order of Circuit Court of September 15th, 1898:

Order Authorizing Clerk to Appoint Commissioners.

THE UNITED STATES OF AMERICA, WESTERN DISTRICT OF NORTH CAROLINA, IN THE CIRCUIT COURT.

The Postal Telegraph-Cable Company,
v.
Southern Railway Company.

It is ordered that S. L. Trogdon, Esq., clerk of this court at Greensboro, North Carolina, do appoint three disinterested and competent freeholders, resident in this district, and sum-

mons them before him. That the said persons so selected shall act as commissioners to assess the damages which the Southern Railway Company may sustain by reason of the erection of the telegraph poles and the stretching of the wires thereon of the Postal Telegraph-Cable Company, as proposed in the petition of said company to this court.

That the said commissioners shall take before the said clerk the oath prescribed in section 1946 of the Code of North Carolina, and shall proceed in all respects as required in said Code in assessing such damages, estimating and assessing such compensation as may be just for said Southern Railway Company by reason of the premises. The said commissioners shall hold their meetings in the court-house of the United States, in the city of Greensboro, over which meetings said clerk shall preside, and they are authorized and empowered to take such testimony in respect to the said damages to the said Southern Railway Company as they may deem pertinent, not, however, extending their inquiry as to the benefit to be derived by the Telegraph Company, or the value thereof to it. The first meeting of the commissioners, of which the said clerk shall give due notice to them and to the parties, shall be held ten days after notice of their appointment has been served on the parties to this cause. After hearing the evidence and reaching their conclusion, the said commissioners shall reduce their award to writing and sign and seal the same, and file it with the said clerk of this court at Greensboro.

CHARLES H. SIMONTON,

15th of September, 1898. *Circuit Judge.*

Order of Circuit Court, dated October 24th, 1898:

Order Sustaining Demurrer and Reinstating Order dated September 15th, 1898.

UNITED STATES OF AMERICA, UNITED STATES CIRCUIT COURT, EASTERN DISTRICT OF VIRGINIA.

Postal Telegraph Cable-Company,
v.
Southern Railway Company.

This day came the defendant Railway Company and by leave of court filed its answer to the complainant's written notice and motion, to which said answer the plaintiff Telegraph Company demurrred, and after argument of counsel, and the matter being duly considered by the court, said demurrer is hereby sustained, and the defendant having asked leave to introduce testimony sustaining the averments of its answer, which leave was refused by the court.

It is therefore ordered, that the former order made by this court, directing the clerk of this court at Greensboro, North Carolina, to appoint commissioners to asssess the damages in the above-entitled cause, is hereby reinstated; and the clerk of this court is directed to fix a day not earlier than ten days after the entry of this order for the meeting of said commissioners, to all of which action of the court, except leave of the court to the defendant to file its answer, the defendant excepts.

24 October, 1898.

CHARLES H. SIMONTON,
Circuit Judge.

Order of clerk of September 19th, 1898:

Notice Appointing Commissioners and Calling Meeting on September 30th, 1898.

UNITED STATES OF AMERICA, WESTERN DISTRICT OF NORTH CAROLINA, IN THE CIRCUIT COURT.

The Postal Telegraph-Cable Company,
v.
The Southern Railway Company.

To Alfred M. Scales, John M. Walker and J. Addison Hodgin:

Pursuant to an order made by his Honor Chas. H. Simonton,

on the 15th day of September, 1898, to me directed, in the above-entitled cause, commading me to summon three disinterested freeholders as commissioners to assess the damage of the said Southern Railway Company, which may accrue to same by reason of the construction of a line of telegraph along the right of way by the plaintiff, The Postal Telegraph-Cable Company, and to fix a time for the assembling of said commissioners, and the taking of testimony bearing upon the issues by them to be tried; I have this day appointed as commissioners in said cause, Alfred M. Scales, John M. Walker and J. Addison Hodgin, residents of the county of Guilford, N. C., of such appointment you will, therefore, take notice of, and you are hereby summoned to appear and sit upon the hearing of the said cause in the court-room of the United States Circuit Court in Greensboro, N. C., on September 30th, 1898, at 10 o'clock A. M., and herein fail not upon penalty of law.

Done this 19th day of September, 1898, as witness my hand and the seal of this court.

[Seal.] SAM'L L. TROGDON, *Clerk.*

Order of clerk of October 24, 1898:

Notice to Commissioners to Meet on Nov'r 3d, 1898.

UNITED STATES OF AMERICA, WESTERN DISTRICT OF NORTH CAROLINA. IN THE CIRCUIT COURT, FOURTH CIRCUIT, AT GREENSBORO, OCTOBER 24th, 1898.

The Postal Telegraph-Cable Company } Notice to Commissioners to meet on Novem'r 3d, 1898.
v.
The Southern Railway Company. }

To A. M. Sales, J. M. Walker, and Jas. A. Hodgin, Commissioners in the above-entitled case:

You are hereby summoned and directed to appear and be in the courtroom in the U. S. building at Greensboro, N. C.,

November 3rd, 1898, at 10 o'clock A. M., at which time
d place a hearing will be had by you for the purposes ex-
essed in the order of his honor, Charles H. Simonton, au-
orizing your appointment and in the notice heretofore served
you.

Witness my hand and the seal of this court, October 24th,
98.

[Seal.] SAM'L L. TROGDON, *Clerk.*

These are all the orders of the Circuit Court, and the Cir-
it Court of Appeals, to which error has been assigned by
e plaintiff in error, in its assignment of errors in this court.
I will not occupy the time or impose upon the patience of
is court with an argument showing that neither of them is
inal order. That is manifest.

The assignment of errors embraces two orders of the *clerk*
the court, made pursuant to the orders of the Circuit Court.
course, those assignments of error will not be noticed.
ey might properly be endorsed: "Nervous assignments of
ror."

Hence, I insist that, inasmuch as neither of the orders com-
ined of is a final order, altogether they cannot make a final
der, and, therefore, this court has no jurisdiction of this ap-
l, and the writ of error should be dismissed.

Counsel for plaintiff in error, however, undertake to set at
fiance all precedents, by arguing that the order of the Cir-
it Court refusing to hear testimony to support the allega-
ns of their answer to the petition of the defendant in error,
which a demurrer had been sustained, was a final order.

Judge Morris, in his opinion for the Circuit Court of Ap-
ls, answering that, says: "There can be found no case in
decisions of the Supreme Court of the United States
ich has so held."

TWO OTHER GROUNDS FOR DISMISSAL.

I will now present two other grounds for dismassal of the writ of error, for want of jurisdiction.

FIRST.

THE CAUSE WAS PREMATURELY REMOVED FROM THE STATE TO FEDERAL COURT.

This cause was prematurely removed from the State court to the Federal court: hence, the United States Circuit Court obtained no jurisdiction of it.

This cause, as shown from the record, was removed from the State Court of North Carolina, where, under the statutes of that State, it was authorized to be instituted and prosecuted, into the United States Circuit Court, ere it became a suit, a controversy, or a cause of action. It was in its incipient stage.

STATUTES OF NORTH CAROLINA.

Section 2007 of the Code of 1883 of North Carolina provides: "Any telegraph company chartered or incorporated by this or any other State, shall have the right to construct, maintain and operate lines of telegraph along any railroad or other public highway in the State of North Carolina; but such lines of telegraph shall be so constructed and maintained as not to obstruct or hinder the usual travel on such railroad or other highway."

Section 2008 provides: "Such telegraph company shall have power to contract with any person or corporation the owner of any lands or any franchises therein, whereon said line of telegraph is proposed to be erected, for a right of way for the planting, repairing and operation of its poles or other property, and for the erection and occupation of offices at suitable distances, for the public accommodation."

Section 2009 provides: "Said telegraph company shall be entitled to a right of way over the lands, privileges and ease-

ents of other persons and corporations, and the right to erect
oles and establish offices, upon making just compensation
ierefor."

Section 2010 provides: "Whenever such telegraph company
iall fail, on application therefor, to secure, by contract or
greement, such right of way for the purposes aforesaid, over
ie lands, privileges or easements of another person or corpo-
ation, it shall be lawful for such telegraph company, first giv-
g security for costs, to file its petition before the Superior
ourt for the county in which said lands are situated, or in or
irough which said easement, privilege or franchise exists, set-
ng forth and describing the parcels of land, privilege or ease-
ent over which the way, privilege or right of use is claimed;
ie owners of the land, the easement or privilege, and their
ace of residence, if known, and if not known, that fact shall
e stated, and such petition shall set forth the use, privilege or
her right claimed, and must be sworn to; and if the use or
ght be over or upon an easement or right of way, it shall be
fficient to give jurisdiction if the person or corporation own-
g the easement or right of way be made a party defendant;
orided, that only the interest of such parties as are brought
efore the court shall be condemned in any such proceeding;
id if the right claimed be over or upon an easement or right
way extending to or through more counties than one, the
hole right and controversy may be heard and determined in
ie county into or through which said easement or right of
ay extends."

Section 2011 provides: "A copy of said petition, with notice
the time and place that the same shall be presented to the
iperior Court, must be served on the person or persons whose
terests are to be affected by the proceeding, at least ten days
ior to the presentation of the same to said court. If the
rty on which the service is to be made be a corporation, it
iall be sufficient if notice be served on an officer or agent of
e corporation found in the county in which the land or ease-
ent is situated, or upon any other officer of the corporation."

It was under those sections of the statute that the Telegraph Company was proceeding, and under section 2011, above quoted, a copy of its petition, with a notice of the time and place the same would be *presented to the Superior Court*, was served on the appellant on the 11th day of June, notifying it that its petition *would be presented to the Superior Court of Guilford county on the 22d of June, 1898.* That was all that had been done in the proceeding, when the appellee was confronted with an application on the part of the appellant for an order from the court removing the cause to the Circuit Court for the Western District of North Carolina. I insist, therefore, that even if the matter could at any time be removed into the United States Court, it could not have been done at that stage of the proceedings. And in support of this contention, I beg to call the attention of this Honorable Court to the opinion of Mr. Justice Field, in the case of *Boom Co.* v. *Patterson*, 8 Otto., 403, which was a writ of error to the Circuit Court of the United States for the District of Minnesota. The Boom Company was created under the laws of Minnesota, and the owner of the land was a citizen of Illinois. The company was authorized under the laws of Minnesota to enter upon and occupy any land necessary for properly conducting its business; and if such land was private property to apply to the District Court of the county in which it was located for the appointment of commissioners to appraise its value, and take proceedings for its condemnation. The law is so framed as to give proper notice to the owners of the land and secure a fair appraisement of its value. If the award of the commissioners should not be satisfactory to the company, or any one claiming an interest in the land, an appeal may be taken to the District Court, where it is to be entered by the clerk "as a case upon the docket of the court," the persons claiming an interest in the land being entered as plaintiffs, and the person seeking its condemnation, as defendant. The court is then required to proceed "to hear and determine such cases in the same manner as other cases are heard and determined in the said court."

es of fact arising thereon are to be tried by a jury, unless jury be waived. The value of the land being assessed by jury, or the court, as the case may be, the amount of the ssment is to be entered as a judgment against the company, ch is subject to review by the Supreme Court of the State vrit of error.

ield, J., in delivering the opinion of the court, said:

The only question on which there was any contention in Circuit Court, was as to the amount of compensation the er of the land was entitled to receive, and the principle n which the compensation was to be estimated. But the pany now raised a further question as to the jurisdiction he Circuit Court. Objections to the jurisdiction of the t below, that go to the subject matter of the controversy not to the form merely of its presentation, or to the char- r of the relief prayed, may be taken at any time. They not waived, because they were not made in the court w.

The position of the Company under this head of jurisdic- is this: that a proceeding to take private property for ic use, is an exercise by the State of its sovereign right of ient domain, and with its exercise the United States, a sep- e sovereignty, has no right to interfere by any of its de- ments. *This position is undoubtedly a sound one so far as the of appropriating the property is concerned.* (Italics ours.) right of eminent domain, that is, the right to take private erty for public uses, appertains to every independent gov- ient. It requires no constitutional recognition; it is an bute of sovereignty. The clause found in the Constitu- of the United States providing for just compensation for erty taken, is a mere limitation upon the exercise of the t.

When the use is public, the necessity or expediency of ap- riating any particular property is not a subject of judicial izance. The property may be appropriated by an act of Legislature, or the power of appropriating it may be dele-

gated to private corporations, to be exercised by them in the execution of works in which the public is interested.

"But, notwithstanding the right is one that appertains to sovereignty, when the sovereign power attaches conditions to its exercise, the inquiry whether the conditions have been observed is a proper matter for judicial cognizance. If that inquiry takes the form of a proceeding before the court between the parties, the owner of the land on the one side and the company seeking the appropriation on the other, there is a controversy which is subject to the ordinary incidents of a civil suit, and its determination derogates in no respect from the sovereignty of the State. This proceeding in the present case, before the commissioners appointed to appraise the land, was in the nature of an inquest, to ascertain its value, *and not a suit in the ordinary sense of these terms;* but when it was transferred to the District Court, by appeal from the award of the commissioners, it took under the statute of the State the form of a suit at law, and was thenceforth subject to its ordinary rules and incidents.

"The point in issue was the compensation to be made to the owner of the land; in other words, the value of the property taken. No other question was open to contention in the District Court. *Turner* v. *Holleran*, 11 Minn., 253. The case would have been in no essential particular different had the State authorized the company by statute to appropriate the particular property in question, and the owners to bring suit against the company in the courts of law for its value. That a suit of that kind could be transferred from the State to the Federal court, if the controversy were between the company and a citizen of another State, cannot be doubted, and we see no reason against the transfer of the pending case that might not be offered against the transfer of the case supposed."

In the case of *Baltimore, etc., R. R. Co.* v. *P. W. & Ky. R. R. Co.*, 17 W. Va., 812, Mr. Justice Johnson, after quoting in his opinion the language of Justice Field, as above, says:

"In this case the only question was as to the *compensation*

aid to the owner of the land, and we can very well see ontroversy between citizens of different States on this n might be removable to the Federal Court, because it much like any other controversy. As we have already *fore the question of compensation can properly arise, the st of necessity declare that the private property sought to be ated must be condemned; with the question of the appropri- the lands sought to be taken, the government of the United separate sovereignty, unless it is the party seeking the condem- as nothing to do* (italics ours). And no foreign corporation he courts of the United States condemn the land of a citi- a State for the use of such corporation; and if the Fed- urts have not original jurisdiction for such purpose, a ing of that kind instituted in the State Courts cannot ved to the Federal Courts, because the Federal Court der no circumstances have jurisdiction in such cases. ntrary doctrine would destroy every vestige of control State has over its own internal affairs. If there is any ng which is supposed to be sacred to the States, it is le by which the title to its lands shall be vested and di- Take that away, and the principle by which it has the regulate its own internal affairs is gone."

on 2012 of the Code of North Carolina, by virtue of he proceedings in this cause were instituted, provides ws:

proceedings for the condemnation of land, or any t or interest therein, for the use of telegraph campanies, raisal of the land or interest therein, the duties of the sioners of appraisal, the right to file exceptions to the f the commissioners of appraisal, the mode and man- ppeal, the power and authority of the court or judge, judgment, and the manner of its entry and its enforce- nd the right of the company pending the appeal, shall escribed in this chapter, for condemning lands for the ailroads."

Secton 1945 of said chapter provides as follows:

"On presenting such petition to the Superior Court as aforesaid (having reference to petition provided for in section 1944 of the Code, by railroad companies for securing their right of way), with proof of service of a copy thereof, and notice as aforesaid, all or any of the persons whose estates or interests are to be affected by the proceedings, may answer such petition and show cause against the granting of the prayer of same, and may disprove any facts alleged in it. The court shall hear the proofs and allegations of the parties, and if no sufficient cause is shown against granting the prayer of the petition, it shall *make an order for the appointment of three* disinterested and competent freeholders, who shall reside in the county where the premises are to be appraised, for the purposes of the company, and shall fix the time and place for the first meeting of the commissioners."

When this section is read in connection with sections 2007, 2008, 2009, 2010 and 2011 (which definitely set out what shall be contained in the petition of the telegraph company, it being altogether different from that which must be embraced in the petition of a railroad company for condemning lands for its right of way, as provided in Sec. 1944), it is manifest that the only answer the railroad company could make to the petition of the telegraph company would be to deny the jurisdictional facts required in Section 2007 and 2010 to be alleged, viz: that the telegraph company was incorporated; that it had given security for costs, and that it was unable to secure by contract or agreement such right of way for its purposes; when, if the court, after hearing the proofs and allegations of the parties, was of opinion that no sufficient cause was shown against granting the prayer of the petition, it was required to make an order for the appointment of three disinterested and competent freeholders for the assessment of just compensation or damages. Before any answer was filed by the appellant and before any order was made appointing commissioners, and be-

fore the assessment of damages by the commissioners—in fact before anything was done, except the mere giving notice to the appellant that the appellee *would on the 22nd day of June, 1898, present its petition to the Superior Court of Guilford county, as provided for in section 2011, supra*, the appellant filed its petition and bond, and entered its motion for removal to the Federal Court. The petition and bond for removal were filed in the Superior Court of North Carolina before the petition of defendant in error was presented to the court. All that had been done was the issuance and service of a notice that the petition would that day be presented to the Superior Court. That was all the statute authorized to be done up to that time.

I insist that, if the opinions of the learned courts above quoted from, are to be regarded as authority, then the cause was surely prematurely removed into the United States Court, thereby denying the State court the privilege of passing upon the power of the petitioner to exercise the right of eminent domain. And I submit, under the rulings of the courts above quoted, that until the commissioners had been appointed, and had assessed the just compensation to which the appellant was entitled, and their report had been made to the court, with the right of either party to appeal to the court, at term, there was no such case or *cause of action in any court*, that could authorize the interposition of the Federal Court and give it jurisdiction.

Thus it appears that the statute of North Carolina is almost identical with that of Minnesota, under which the case of *Boom Co.* v. *Patterson, supra*, was conducted, in which Judge Field held: "The position of the company on the head of jurisdiction is this: that a proceeding to take private property for public use is an exercise by the State of its sovereign right of Eminent Domain, and with this exercise the United States, a separate sovereignty, has no right to interfere by any of its departments. This position is undoubtedly a sound one, so far as the act of appropriating the property is concerned. The right of Eminent Domain—that is, the right to take private property for public use—appertains to every independent gov-

ernment. It requires no constitutional recognition; it is an attribute of sovereignty. This clause, found in the Constitution of the several States, providing for just compensation for property taken, is a mere limitation upon the exercise of the power. * * *

"The proceeding in the present case, before the commissioners appointed to appraise the land, was in the nature of an inquest to ascertain its value, *and not a suit at law* in the ordinary sense of these terms. *But when it was transferred to the District Court by appeal from the award of the commissioners*, it took, under the statutes of the State, the form of a suit at law, and was thenceforth subject to its ordinary rules and incidents."

I insist, therefore, under that high authority, the interposition of the Federal Court, and the removal of the proceeding, when it did, was premature. It had not even been presented to the court, nor gotten before the commissioners; no commissioners had been appointed to ascertain the damages to which the appellant was entitled. Consequently there was no suit at law in the ordinary sense of these terms. It was at that stage a lifeless, inanimate thing, and removed from the womb of the State court ere it assumed the shape and form of "a suit at law"; but according to the opinion of the learned judge, if the appellant had bided its time with patience until the commissioners had been appointed and assessed the damages and made their report, and the case had gotten into the Superior Court, it would have been *a suit at law* in the ordinary sense of these terms, and removable.

It cannot be said that to have waited that long—the appellee having the right after assessment of the damages to pay the amount into court and proceed with the construction of its lines—in the event of a reversal, that the appellant would have suffered incalculable damages, because section 1946 of the Code of North Carolina provides:

"But if the court shall refuse to condemn the land, or any portion thereof, to the use of said company, then in that event

the money paid into court, or so much thereof as shall be adjudged, shall be returned to said company; and the company shall have no right to hold said land not condemned, but shall surrender possession of the same on demand to the owner or owners, or his or their agents or attorneys. And the court, or judge, shall have full power and authority to make such orders, judgments and decrees, and issue such executions and other processes as may be necessary to carry into effect the final judgment rendered in said proceedings."

Thus ample protection is given the plaintiff in error in any contingency.

Searl v. *School District No. 2*, 124 U. S., pp. 199–200.

Mr. Justice Mathews, for this Court, in his opinion in the above cause commenting upon the law of eminent domain, as it then existed in the State of Colorado, says:

"The fact that the Colorado statute provides for the ascertainment of damages by a commission of three freeholders, unless at the hearing a defendant shall demand a jury, does not make the proceeding from its commencement any the less a suit at law within the meaning of the Constitution and acts of Congress and the previous decisions of this court. The appointment of the commissioners is not, as in the case of *Boom Co.* v. *Patterson*, and the Pacific Railroad Removal cases, a step taken by the party seeking to make the appropriation *ex parte* and antecedent to the actual commencement of the adversary proceeding *inter partes*, which constitutes a suit in which the controversy takes on the form of a judicial proceeding. * *

"The precise question involved here was passed upon and satisfactorily dealt with by the Circuit Judge in the Circuit Court for the District of Colorado in the case of the *Colorado Midland Railway Co.* v. *Jones*, 29 Fed. Rep., 193, and by the Circuit Court for the Western District of Michigan by the District Judge, Brown, in the case of *The Mineral Range Rail-*

road Co. v. *The Detroit and Lake Superior Copper Co.*, 25 Fed. Rep., 515."

In the *Colorado Midland Railway case*, 29 Fed. Rep., 193, the court said:

"The Legislature may provide under what circumstances and in what manner this compensation shall be determined, and when it has provided that which is equivalent to a suit at law, in which the only controversy remaining to be considered is the amount of compensation, there exists a suit—a controversy—which under the removal act may be removed to the Federal Court provided the citizenship of the parties justify it.

That right of removal has been affirmed in two cases in the Supreme Court, *Boom* v. *Patterson*, 98 U. S., 403; *Union Pacific* v. *City of Kansas*, 115 U. S. So that the question in this case is narrowed to this: whether there was, at the time this petition and bond for removal were filed, such a proceeding pending as could be considered fairly a suit at law, and in which the whole matter of inquiry was the amount of compensation. If there was, then there was a suit which is removable; otherwise not."

The other case referred to by Mr. Justice Mathews approvingly, that of the *Mineral Range R. R. Co.* v. *Detroit & Lake Superior Copper Co.*, 25 Fed. Rep., 515, was this:

A State statute provided that proceedings for the condemnation of lands for railroad purposes should be instituted in the probate court of the proper county; that the necessity for the taking of lands and their value should be determined by commissioners or a jury selected by such court, and that such a proceeding should only be subject to review by the Supreme Court. Under this statute, a railroad company petitioned the probate court for the condemnation of defendant's lands. Defendant answered the petition, and demanded the removal of the cause to the Federal Court. Held, that the case was removable directly from the probate court.

In that case (page 517), Judge Brown said:

"Did the statute for the condemnation of land also provide for an appeal from the probate court to the circuit court, and the framing of an issue there, we should find no difficulty in holding, as was held in that case (*Hess* v. *Reynolds*, 113 U. S., 73,) and *Boom* v. *Patterson*, that the removal should be from the circuit court, and not from the probate court."

Section 1946 of the Code of North Carolina provides:

"They (commissioners) shall report the same (their findings) to the court under their hands and seals, and within twenty days after filing the same any person interested in the said land may file exceptions to said report, and upon the determination of the same by the court, either party to the proceedings may appeal to the court at term, and thence, after judgment, to the Supreme Court. The court or judge, on the hearing, may direct a new appraisal, modify or confirm the report, or make such order in the premises as to him shall seem right and proper."

Under the statutes of North Carolina, the clerk of the Superior Court is vested with all the powers of the court, in vacation, and the return of the award of the commissioners, provided for in section 1946, above quoted, is made to the clerk, and not to the court. Section 132 of the Code of 1883 provides as follows:

Section 132.

Definition of Court, to Mean Clerk, When.

"In those of the following enactments which confer jurisdiction or power, or impose duties, when the words superior court, or "court" in reference to a superior court, are used, they mean the clerk of the superior court, unless otherwise specially stated, or unless reference is made to a regular term of the court, in which cases the judge of the court alone is meant.

"*McAdoo* v. *Benbow*, 63–461; *Pelletier* v. *Sanders*, 67–261."

Also section 251.

Jurisdiction of Clerk on Pleadings, etc.

"The clerk of the superior court shall have jurisdiction to hear and decide all questions of practice and procedure in this court, and all other matters whereof jurisdiction is given to the superior court, unless the judge of said court, or the court at a regular term thereof, be expressly referred to.

"*McAdoo* v. *Benbow*, 63–461; *McAdoo* v. *Banister*, 63–478; *Johnson* v. *Judd*, 63–498; *Tate* v. *Powe*, 64–644; *Marsh* v. *Cohen*, 68–283; *Com'rs* v. *Blackburn*, 68–496; *Brendle* v. *Heron*, 68–496; *Bryan* v. *Hubbs*, 69–423; *Palmer* v. *Bosher*, 71–291; *McKethan* v. *McNeill*, 74–663."

Section 252.

Any Party May Appeal.

"Any party may appeal from any decision of the clerk of the superior court, on an issue of law or legal inference to the judge without undertaking

"*Capps* v. *Capps*, 85–408."

It is manifest from these provisions of the Code of North Carolina that, in a proceeding of this kind, the clerk appoints the commissioners and the report of the commissioners is made to him in vacation, and an appeal can then be had to the court at term, and thence after judgment to the Supreme Court.

Hence, under the authorities above cited, with this provision of the North Carolina Code, I insist that this case was prematurely removed, and the Circuit Court of the United States had no jurisdiction of it.

SECOND.

THE AMOUNT INVOLVED IN THIS CONTROVERSY IS LESS THAN $2,000.

Under the removal act of 1875, and the decisions of this

urt, it was doubtless the duty of the State Court, upon the ing of the petition and bond by plaintiff in error, to have tered an order for removal. That court, however, declined do it, because in his opinion, the amount in controversy d not exceed $2,000. The petition of the defendant in ror, presented to the State Court averred that—

"Said telegraph line, when constructed, will in no way mage the property of said railroad company, nor impair r diminish the value of said right of way for railroad purses, but that the same will be beneficial to said railroad mpany and its patrons." Record, p. 5.

It is true the petition for removal averred that the amount controversy exceeded $2,000. The State Court in its judgent said:

"This court holding that the amount in controversy is not own by the pleadings in said cause to be as much as $2,000, l from the facts stated in the petition of the Postal Teleph-Cable Company, the court is of the opinion that the ount of damages to which the railroad is entitled from the egraph company for the rights and privileges sought in l petition are less than $2,000." Record, p. 9.

Afterwards, when the cause had been removed to the Cir Court the defendant in error entered a motion to remand, ch I respectfully submit, the learned Circuit Judge erred verruling. His opinion on that point is as follows (record, 23 and 24):

The grave question made here is upon remanding this se to the State Court. It is contended that this court has urisdiction because of the amount of the matter in controy—that being less than two thousand dollars.

It has been contended with great ability and eloquence that he present case the Postal Telegraph-Cable Company seeks rect its poles on the right of way of the railway company, ch has already been dedicated to a public use. That it is

confined to the public use. That, therefore, in estimating the compensation to be paid the railway company the same rule cannot be followed which obtains in the condemnation of the property of a private person. That such private person holds his property and can put it to any use, and compensation for taking it must be measured accordingly. The railway company holds its property for a public use only, and its compensation must be measured only by the interference with its performance of its public duty, growing out of the public use. That the petition declares an intent in no way to interfere with this public use, and so the compensation to the railway company for putting up the poles and stretching the wires must be nominal. Strong as this line of argument is, and however convincing under other circumstances, it does not apply to the question at issue. That question is, must this case be remanded. The answer to this question depends upon the matter in controversy. What is the matter in controversy? The compensation to be allowed to the railway company for the erection of the poles and stretching of the wires by the telegraph company. The latter allege that this compensation should be nominal. The former allege that it should greatly exceed two thousand dollars. The question is, does it exceed two thousand dollars? On this question the petition of the plaintiff in the State Court and that of the defendant for removal differ, and on it the issue is joined. 'By this phrase,' says the Supreme Court, in *Smith* v. *Adams*, 130 U. S., 168, '*by this phrase*,' 'matter in dispute,' as used in the statutes conferring jurisdiction on this court, is meant the subject of litigation, the matter upon which the action is brought and issue is joined, and in relation to which, if the issue is one of fact, testimony is taken and its pecuniary value may be determined not only by the money judgment prayed, but in some cases by the increased or diminished value of the property directly affected by the relief prayed as by the pecuniary result to one of the parties immediately from the judgment.

See also *New England Mortgage Co.* v. *Gay*, 145 U. S., 127; *Clay Center* v. *Farmers*, *ibid.*, 224.

"In estimating the amount of the matter in controversy, the court is governed by the claim made, provided that there is no reason to believe that the claim has no *bona fide* existence, and is only made to secure jurisdiction. *Barry* v. *Edmunds*, 116 U. S., 550. This, then, is the mode of ascertaining the amount of the matter in controversy, and it being claimed on the one side that it greatly exceeds two thousand dollars, and wholly denied on the other, the determination of this issue gives this court jurisdiction. The issue must be tried in accordance with the laws of North Carolina in such case made and provided, and on the trial of the issue will come up the points so ably presented by counsel at bar.

"Let an order be entered in the equity cause, continuing the restraining order until the further order of this court.

"Let an order be entered refusing to remand the cause removed."

The cases cited by the learned Circuit Judge to sustain his opinion in that case—*Smith* v. *Adams*, 130 U. S., 168; *New England Mortgage Co.* v. *Gay*, 145 U. S., 127; *Clay Center* v. *Farmers*, *ibid.*, 224, I respectfully submit—fail to sustain the conclusion of the court, but the very contrary. This court in each of those cases dismissed the cause for want of jurisdiction, because the amount in dispute was insufficient.

Mr. Justice Field, in his opinion in the first case cited, page 175, says:

"It is conceded that the pecuniary value of the matter in dispute may be determined, not only by the money judgment prayed, where such is the case, but in some cases by the increased or diminished value of the property directly affected by the relief prayed, or by the pecuniary result to one of the parties immediately from the judgment. Thus a suit to quiet the title to parcels of real property, or to remove a cloud therefrom, by which their use and enjoyment by the owner

are impaired, is brought within the cognizance of the court, under the statute, only by the value of the property affected. So, in a case impeaching the right to an office, the amount of the salary attached to it is considered as determining the value of the matter in dispute. Not doubting the correctness of the doctrine thus stated, we do not perceive how it can help the appellants." And held that there is not in the case such an amount in dispute as to enable this court to take jurisdiction of the appeal.

In the next case, 145 U. S., at page 130, Mr. Justice Brown, for the court, said:

"It is well settled in this court that when our jurisdiction depends upon the amount in controversy, it is determined by the amount involved in the particular case, and not by any contingent loss either one of the parties may sustain by the probative effect of the judgment, however certain it may be that such loss will occur."

Citing the case of *Ross* v. *Prentiss*, 3 How., 771, "where a bill was filed to enjoin the marshal from levying an execution of less than $2,000 upon certain property, the value of which was more than $2,000. In this case, as in the other, the argument was made that the defendent might lose the whole benefit of his property by the forced sale under the execution, but the court held that it did not depend upon the amount of any contingent loss, and dismissed the bill. In *Troy* v. *Evans*, 97 U. S., 1, action was brought to recover certain instalments upon bonds, the aggregate of which bonds exceeded $5,000, but the judgment was for less. The case was dismissed, although it appeared that the judgment would be conclusive in another action upon future instalments upon the same bond."

The court concluding the opinion by saying:

"Upon the whole, it appears to us that we have no jurisdiction of this case, and that the writ of error should be dismissed, and it is so ordered."

In the case of *Clay Center* v. *Farmers' Loan & Trust Co.*, me volume, pp. 224–225, Chief Justice Fuller said:

"This was a suit to recover of the city of Clay Center two stalments of hydrant rental for eighteen hundred and fifty ollars each, with interest. These rentals were claimed to be ue under an alleged contract in respect of the erection of ater-works, between the city and one Bonebrake and a Water-orks company, his assignee and successor, and to be payable nder said contract to the Farmers' Loan & Trust Company, ustee in a trust deed to secure bonds issued by the Water-orks Company for the purpose of borrowing money to com-lete the construction of the works. * * *

"The value of the matter in dispute was the accrued rental nd interest, and although the determination that such rental as due and should be paid to the trustee involved the ex-tence and validity of the contract, yet causes of action for ydrant rental which had not accrued but might subsequently ecrue cannot be availed of to make out jurisdiction of the se by this court upon appeal."

In the case at bar the amount involved is the damages to which e Railway Company is entitled by reason of the construc-on of the telegraph line in the manner set out in its petition. he Telegraph Company not only, in its petition addressed to e State Court of North Carolina, averred that the amount volved was merely nominal, but in its application to remand. herefore, the burden of proof to show that the amount in-olved exceeded $2,000 was upon the Railway Company, in e motion to remand. No testimony was offered to show that exceeded $2,000, but upon the contrary, I insist that the ircuit Court should have taken into consideration in passing on the jurisdictional question, upon a motion to remand, hat was the measure of damages to which the railroad com-ny was entitled from the telegraph company as a matter law.

The rule is this: where the law gives no rule, the demand

of the plaintiff must furnish one, but where the law gives the rule, the legal course of action, and not the plaintiff's demand, must be regarded. For instance, if a suit be brought on a promissory note for $100, and the plaintiff claims in his declaration damages to the amount of $5,000, surely the Circuit Court, upon an application to remand, would not retain jurisdiction because the declaration claimed $5,000, when, as a legal proposition, it was manifest to the mind of the court that only $100, with interest, was the real amount involved.

I insist, therefore, that the mere allegation in the petition for a removal, that the amount in controversy exceeds $2,000, with interest and costs, did not *ipso facto* authorize the Circuit Court to retain jurisdiction of the cause, but, upon the contrary, that it was the duty of the court to look into the entire record, which included the petition of the telegraph company, and to take into consideration the *law* governing the measure of damages in such proceedings.

Chicago, Burlington & Quincy R. R. Co. v. City of Chicago, 166 U. S., 226.

I insist that the principle laid down by the Supreme Court of the United States in the case of the *Chicago, B. & Q. R. R.* v. *The City of Chicago*, 166 U. S., 226, as to the measure of damages which the Railroad Company was entitled to receive from the city, when a portion of its right of way was taken for the use of a street, should govern and control in proceedings of this kind. I am sustained in that contention by the Supreme Court of Illinois in the case of *St. Louis, &c. Ry. Co.* v. *Postal Telegraph-Cable Co.*, 173 Ills., 508.

That honorable court says:

"The measure of damages, therefore, suffered by the Railroad Company, is not the land embraced within the right of way between the poles and under the wires, but the measure of damages is the extent to which the value of the use of such spaces by the Railroad Company is diminished by the use of the same by the Telegraph Company for its purposes." Citing

Q. R. R. Co. v. *Chicago*, 149 Ill.; and the same, 166 States, 226.

court, in its opinion in that case, said: "The Railroad ny holds its right of way, so far as is made to appear, for railroad purposes, and is restricted in its use of the r such purposes. Under this view of the estate that lroad Company has in its right of way, it is difficult to the damage sustained by the road can be more than l damages."

on 1957, of the Code of North Carolina (1883) provides:

CORPORATE POWERS.

ry railroad corporation shall have power:
Holding property.

purchase, hold and use all such real estate and other y as may be necessary for the construction and main- of its railroad and the station and other accommoda- ecessary to accomplish the objects of its incorporation."

Supreme Court of Illinois, continuing, says:

s further argued that the petition fails to show that the d telegraph line will not incommode the public use of road. The allegations of the petition, as already above l to, show that this objection is not well taken. Such ons must be considered in connection with the location elegraph line. The location of the line as indicated in ition, shows that the public use of the railroad will not ously incommoded."

in this connection to call the attention of this honor- urt to the petition filed in this cause, setting out the in which the Telegraph Company proposes to con- ts lines upon the right of way of the railroad, which e apparent to every one, cannot at all incommode its cord, pp. 3, 4, 5 and 6). The Supreme Court of Illi- its said opinion upon this question, says: "These

allegations in the petition are in the nature of stipulations, to which the petitioner binds itself. Such stipulations have been held valid by the decisions of this court." *Chicago & Alton R. R. Co.* v. *Joliet, Lockport & Aurora R. R. Co.*, 105 Ill., 388; *Peoria and Pekin R. R. Co.* v. *Peoria and Farmington R. R. Co.*, 105 *Id.*, 140.

Again the court says: "The spaces over which the wires are strung from pole to pole, are not taken by the telegraph company. Such damage as the construction and operation of the telegraph line causes to the spaces between the poles the appellants are entitled to recover. The telegraph company does not acquire by the judgment of condemnation the fee to any portion of the right of way. Any construction which holds that it does acquire the fee is not sanctioned by the language of the act in relation to telegraph companies. The act does not confer the right to use the land condemned for any other purpose than for telegraph purposes. The company cannot take possession of it or injure it, for any other purpose than to erect telegraph poles, and to suspend wires upon them and to maintain and repair the same. The company will have the right to enter upon that portion of the right of way which is between the telegraph poles and under its wires, for the purpose of repairing its lines. But the telegraph company acquires no right to exclude the railroad company from the use of the land. The ownership of the railroad company remains as it was before, while the telegraph company merely acquires an easement upon what it condemns, for the purpose of entering thereon in order to erect and repair the line." *St. Louis, etc.*, v. *Postal Tel.-Cable Co.*, 173 Ill., 508 (1898).

In which case, that court sustained a judgment for nominal damages, and held that the principle announced in *C. B. & Q.* case, 166 U. S., 220, applied to and should govern that case.

Also the case of *M. & O. Ry. Co.* v. *Postal Telegraph-Cable Co.*, 46 S. W. Rep., 576, where the Supreme Court (Tenn.) sustained a judgment for nominal damages only, and held,

as did the Illinois court, that the principle announced in the Chicago case should and does govern. The court says:

"This is simply a case where the railroad is not using the space occupied by the posts and wires, and when it cannot convey it to another for any purpose, in which case only nominal damages arise." In that case nominal damages only were awarded to the railroad company in a condemnation proceeding by the telegraph company for the right to construct, maintain, and operate its telegraph lines along and upon the right of way of the railroad.

There were two causes at the same time before the court on appeal by the railroad company between the same parties and involving the same question. Under the statute of Tennessee, a separate condemnation proceeding was required by the telegraph company in each circuit court district through which the road runs; hence, there were two causes appealed from two separate circuit court districts, which were heard by the Supreme Court together. The court said: "The causes are before us on appeal by the railroad company, but the real party in interest is the Western Union Telegraph Company, a competing line, with which the railroad has a contract for an exclusive line over its right of way, and which has a right under its contract to use the name of the railroad company in any suit to resist the attempt of any competing line to construct any other lines upon its right of way.

"It does not acquire any estate in fee. It only acquires an easement or right of way, and this only for railroad purposes. While its right of way extends to a certain distance on each side of its track, it has no right to occupy the way beyond its track, cuts and fills, or to such distance and to such an extent only to maintain its track and operate its trains. It can only go beyond these limits for necessary railroad purposes. It cannot sell, transfer, encumber or use its right of way except as its necessities and conveniences may demand for the proper operation of its road. It cannot license the appropriation of any part of such right of way to private business purposes nor to

public purposes, except so far as needful and helpful to the operation of the road itself.

Jones on Easement, Sec. 383.

"Its right of way can therefore have no market value, because it cannot be placed upon the market, either by a private sale or public outcry. A railroad company is entitled to have a right of way by process of condemnation, because it is a work of internal improvement, a *quasi* public use.

"But it has been held that the land already taken by the exercise of eminent domain for public use, and actually used for that purpose, may be taken by legislative authority for other public uses not inconsistent with or destructive to the former use."

Mills on Em. Dom., Sec. 45, and cases there cited.

"It is not insisted in this case that the use of the right of way and construction of the telegraph lines will be any detriment or obstruction to the railroad, but, on the contrary, it is shown it would be a benefit and convenience. A telegraph line along a railroad is not only a convenience, but a necessity, and is very properly treated as a railroad appurtenance.

"A railroad company may therefore construct a telegraph line along its right of way or permit another to do so, but it acquires and can confer no exclusive right to do so.

"*Western Union Tel. Co.* v. *Balt. & Ohio R. R.*, 19 Fed. Rep., 660.

"*Western Union Tel. Co.* v. *American Union Tel. Co.*, 38 Amer. Rep., 781.

"*Western Union Tel. Co.* v. *B. & O. S. W. R. R.*, 11 Federal Rep., 1.

"*Pensacola Tel. Co.* v. *W. U. Tel. Co.*, 3 Otto., 124.

"*Amer. & Eng. Enc. Law*, Vol. 3, pp. 885–6, 1st ed.

"Under this view of the estate and interest which railroad companies have in their right of way, it is difficult to see how the damages sustained by the road can be anything but nominal.

"It is said with much earnestness and with some degree of plausibility that it would be unjust to allow a telegraph company to plant its poles along the right of way, when the railroad company had expended thousands of dollars to clear and keep it free of obstructions, and yet pay nothing for the privilege. But this view is more specious than sound, for the railroad must incur this expense for its own purposes, whether the telegraph line is there or not, and must keep its right of way clear of obstructions, whether it is occupied by a telegraph line or not, and there is no greater burden or expense because of the presence of the telegraph line.

"The learned trial judge in the Madison county case held: 'The measure of damages to the defendant is the amount of decrease in value of the use of the right of way for railroad purposes when it is jointly used for telegraph purposes. This rule was no doubt adopted from the rule laid down by the *Supreme Court of the United States in the case of C. B. & Q. R. R.* v. *the City of Chicago*, 166 U. S., 248."

The Supreme Court of Alabama, in the case of *M. & O. Ry. Co.* v. *Postal Telegraph-Cable Co.*, appealed from the Circuit of Mobile county. Mr. Justice Harelson for the court, in that case, said:

"This cause is an appeal from the Circuit Court to review the proceedings of that court in the trial of the cause of appeal from the Probate Court, where they were instituted, for the condemnation of an easement in favor of the appellee company, to construct and operate its line of telegraph over the right of way of appellant company. The case is here on appeal by the railroad company, but the real party in interest, as appears from the proceedings, is the Western Union Telegraph Co., with which the railroads have a contract for an exclusive line over its right of way, and under its contract said telegraph company may use the name of the railroad company to resist the attempt of any other line to construct on the right of way of the railroad any competing telegraph line.

"In the case before us, a very nominal amount of land constituting right of way is proposed to be taken—only that part of it occupied by posts, one hundred and seventy-five feet apart, leaving the way for all other purposes unobstructed. It is really an easement in an easement, a servitude, true, for which the company is entitled to some compensation under the Constitution. The railroad company, however, holds its right of way so far as is made to appear, simply for railroad purposes, and is restricted in its use of same for such purposes. Under this view of the estate that the railroad company has in its right of way, it is difficult to see how the damages sustained by the road can be anything more than nominal. Indeed, if we might weigh advantages and disadvantages, a competing line would naturally and reasonably appear to be an advantage to the railroad company. * * *

"It has not been shown that the company holds the land as a private individual, to devote it to any purposes it pleases, or to sell it at will at the highest price it will bring on the market. The land constituting the right of way really has no market value, so long as it is used for such purposes. It has been withdrawn by the very uses of the company from marketable land; and when there can be no market value of land by reason of its use as a part of an extensive business or enterprise, its value must be determined by the use to which it is applied, and necessarily not by any supposed market value it has. *I. C. R. R. Co.* v. *City of Chicago*, 141 Ill., 500; *C. B. & Q. R. R.* v. *City of Chicago*, 149 Ill., 457; *C. B. & Q. R. R.* v. *Chicago*, 166 U. S., 226; *Lewis on Em. Dom.*, sec. 485. Commenting on the decision in the Illinois case last cited, which was a case for the condemnation of a street across railroad tracks or right of way, the Supreme Court of the United States, in the case last cited, used language well adapted to the case in hand. They say: "The land as such was not taken, the railroad company was not prevented from using, and its use for all the purposes for which it was held by the railroad company was interfered with, only so far as its *exclusive* enjoyment for the

purpose of railroad tracks was diminished in value by subjecting the land within the crossing to public use as a street.

"The Supreme Court of Illinois well said 'that the measure of compensation is the amount of decrease in the value of the use for railroad purposes caused by the use for purposes of a street, such use of a street being exercised jointly with the use of the company for railroad purposes. In other words, the company is to be compensated for the diminution in its right to use its tracks caused by the existence and use of the street.' The Supreme Court of Illinois held in that case that the trial court did not err in excluding evidence to show the general salable value of the land constituting the right of way included in the crossing, or its general value for other uses than that to which it was applied. The soundness of this principle was approved by the Federal Court, and it appears to be sustained by reason and authority. 149 Ill., 457; 166 U. S., 249; *Mobile & O. R. R. Co.* v. *Postal Tel. Co.*, Sup. Ct. of Tenn., Apr. term, 1898, in MS.—two cases tried and decided together."

The Supreme Court of Mississippi, in the case of the *Mobile & Ohio R. R.* v. *Postal Telegraph-Cable Co.* (1899), in a similar proceeding, held:

"We adopt the rule as first above stated in *St. Louis & Cairo R. R. Co.* v. *Postal Telegraph-Cable Co*, 173 Ill., at page 534; 51 N. E. Rep.—which announces the rule above quoted by the Supreme Court of Illinois."

The court furthermore says:

"This is undoubtedly the sound view. Mr. Justice Harlan puts the point with great clearness in the same case, at page 258, 166 U. S.: 'Compensation was awarded to the railroad company upon the basis of the value of the thing actually appropriated by the public—the use of the company's right of way for a street crossing, having regard to the purposes for which the land in question was acquired and held, and was always likely to be held. In the case of individual owners, they were deprived of the entire use and enjoyment of their

property, while the railroad company was left in the possession and use of its property for the purposes for which it was being used and for which it was best adapted, subject only to the right of the public to have a street across it. In this there was no denial of the equal protection of the laws, unless it be that the public cannot have a street across the tracks of a railroad company, except upon the condition precedent that it shall condemn and acquire the absolute ownership of the land, leaving untouched the right of the company to cross it with its tracks.'

"The doctrine of the *Boom Co.* v. *Patterson*, 98 U. S., 402, has no application to this case. Patterson owned his island absolutely, to be used or sold for any purpose he pleased. His use of it was not limited, as in the use of its right of way by a railroad company.

"The doctrine by Mr. Justice Harlan for the United States Supreme Court above, and of the Supreme Courts of Illinois, of Tennessee, and Alabama, is undoubtedly the only correct view, and, if the case of the *Postal Telegraph-Cable Co.* v. *Alabama & Vicksburg R. R. Co.*, 68 Miss., 314, conflicts with what is here announced, it is, to the extent of such conflict, hereby overruled."

Southwestern Telegraph & Telephone Co. v. Gulf, C. & S. F. Ry. Co. (May 31st, 1899), 52 S. W. Rep., 106.

In this case the court held:

"1st. That in condemnation proceedings by a telegraph company against a railroad for the right of way of a telegraph line, evidence as to what the right of way was worth to the railroad company, or what it cost to acquire it, or that the company contemplated making other improvements in the future, is inadmissible.

"2d. The measure of damages being the damages caused by the interference of the poles with the use of the right of way, the cost of clearing the grass from the poles, which the

railroad company shall desire to burn off its right of way, is not an item of damage.

"3d. The peculiar advantages that the telegraph company might derive from the use of the right of way is not an item of damages."

Citing *C., B. & Q. Ry. Co.* v. *City of Chicago*, 149 Ill., 457, and *Ibid.*, 166 U. S., 226.

Again, the same court, in the case of *Texas & New Orleans R. R.* v. *Postal Telegraph-Cable Co.* (May 31st, 1899), 52 S. W. Rep., 108, held:

"The measure of damages for the appellant in this case was compensation for the diminution in its right to use its tracks, caused by the use to which the right of way would be put by the telegraph company. *C. B. & Q. R. R. Co.* v. *City of Chicago*, 166 U. S., 581. Under no conceivable state of facts could the value of this right of way to the appellee be made the measure by which to determine the damages sustained by appellant. * * The contention that appellee had deprived appellant of a strip of land at least ten feet in width and sixteen miles long, is not borne out by the record."

Each one of these courts holds that the principle announced by the Supreme Court of the United States in the Chicago case, *supra*, should control and govern proceedings of this kind.

Lewis on Em. Dom., section 462, says: "Just compensation, as used in the Constitution, means a fair and full equivalent for the loss sustained by the taking for public use—citing *San Francisco R. R. Co.* v. *Caldwell*, 31 Col., 367; *Alton & Sangomon R. R. Co.* v. *Carpenter*, 14 Ill., 190; *McIntyre* v. *State*, 5th Blackf., 384; *Sater* v. *Burlington & Mt. Pleasant Plank Road Co.*, 1 Ia., 386; *Bangor & Piscataquis R. R. Co.* v. *McCowle*, 60 Me., 290; *Winona & St. Peter R. R. Co.* v. *Denman*, 10 Minn., 357; *Lymons & Cincinnati*, 14 Ohio, 147; *Livingston* v. *New York*, 8 Wend., 85; *Bigelow* v. *West Wis. R. Y. Co.*, 27 Wis., 478; *Chesapeake & Ohio Canal Co.* v. *Key*, 3 Crouch, C. C., 599.

Therefore, nominal damages is just compensation in such cases, for the railroad company is entitled to only nominal damages, for the reason that it sustains no loss by reason of the construction of a telegraph line in the manner set out in the petition; and the Supreme Court of Illinois, in the Chicago case, *supra*, says: "These allegations in the petition are in the nature of stipulations to which the petitioner binds itself. Such stipulations have been held valid by the decisions of this court"—citing *Chicago & Alton R. R. Co.* v. *Joliet, Lockport & Aurora R. R. Co.*, 105 Ills., 388; *Peoria & Pekin Union R. R. Co.* v. *Peoria & Farmington R. R. Co.*, 105 Ills., 110.

"A telegraph line constructed upon the right of way of a railroad is no material interference with its use for railroad purposes." *Lewis on Eminent Domain*, sec. 269; citing *N. W. R. R. Co.* v. *Southern & Atlantic Tel. Co.*, 53 Ala., 211; *West. Union Tel. Co.* v. *American Union Tel. Co.*, 65 Ga., 160; *Balto. & Ohio Tel. Co.* v. *Morgans L. & T. Ry. Co.*, 37 La. Ann., 883.

Since the delivery by Justice Harlan of the opinion of the Supreme Court of the United States in the Chicago case, *supra*, 126 U. S., 226, every court that has had occasion to pass upon the measure of damages to which a railroad company is entitled when a portion of its right of way is taken for the use of a telegraph line, has held that the principles announced in the case of *Patterson* v. *Boom Co.*, 98 U. S., do not apply, because in that case the proceeding was against Patterson, an individual, and he was entitled to the value of his land taken for the public use, for any and all purposes for which it was best adapted. That opinion is not in conflict with the principles announced in the Chicago case, *supra*, but upon the contrary, it is quoted approvingly by the learned judge delivering that opinion.

Long before the cases above cited in 149 Ills. and 166 U. S. were decided, the Supreme Court of Illinois, in 1882, in the case of *Lockey* v. *Mutual Tel. Co.*, 103 Ills., 433, said:

"What does the telegraph company acquire by the judg-

ent of condemnation? It surely was not intended that it ould be the fee of the land condemned [in this case the de- ndant in error expressly states that it does not seek the fee. cord, p. 5, last paragraph.] The company cannot cultivate take exclusive possession of it and enjoy it for any other rpose than to erect poles and suspend wires upon them, and aintain and repair the same, and to use the superstructure telegraph purposes. This is all the petitioner asks, and the tute authorizes it. By designating the width of the strip the condemnation proceedings, the company acquires no ht to exclude the owner of the soil from the use of the land. at remains as it was before, except that the company has quired an easement in the strip condemned, for the purpose erecting its line. The only exclusive right of occupancy quired by such proceeding is to the ground occupied by the es erected for telegraph purposes. These are the rights in- ded to be conferred by law, and all that would or can be nferred under it, and the judgment in this case confers no re."

This case never has been overruled, and never will be, be- se it is predicted upon sound reason, and the law is but the fection of reason.

The same principle is announced by the Court of Queen's nch in the case of *Stebbing* v. *Met. Board of Works* (Court of B., Vol. 6, p. 40). In this case the church-yard had been sed under statutory authority, and the Metropolitan Board Works had acquired by statute the power to take it. The ntiff claimed compensation under the Land Clause Act, the court said: "Owing to the nature of the land, the tor never could have alienated it; he might perhaps have ained an act of parliament permitting the use of a part of r some purpose of a *quasi* secular nature, but he never ld have been allowed to use it in any way for a secular pose, with a view to his own interest. It was therefore, in hands, practically useless. When the Metropolitan Board Works are enabled to acquire it for a public purpose, why

should he be benefited? He can have no claim to have a new value attached to that which was before valueless, simply because the legislature has stated it shall be transferred from one public purpose to another. There is nothing to be found in the act to support the plaintiff's contention, nor is it founded on reason. It is argued for plaintiff that, although in his hands, the church-yards are valueless, yet when they pass to the defendant under the compulsory act of Parliament they acquire a value from the fact that they are applied to secular purposes. I do not think that it is applicable to the present case. When Parliament gives compulsory power and provides that compensation shall be made to a person from whom the property is taken for the loss that he sustains, it is intended that he shall be compensated to the extent of his loss; that this loss shall be decided by what was the value of the thing to him, and not what would be the value of it to the person acquiring it. The plaintiff, as Rector, could never have parted with these church-yards; therefore, to him they were perfectly valueless."

In the case of *Railroad Co.* v. *Catholic Priest*, 119 Ills., 529, the court said:

"Where the owner of land is restricted by statute, or by the provisions of an instrument under which he holds his title or any other binding order, to a particular use of it, so that he can not lawfully apply it to any other use, the measure of his compensation where his land is taken by condemnation, will be its value to him for the special use to which he is so restricted."

Such is the principle laid down in the case of *Alcott* v. *Burr*, 10 C. B., 327; *Allen* v. *Boston*, 137 Mass., 319; 11 Wend., 1149. The last named case was reported in the year 1834. Hence these are not new principles. They are old principles which are applicable to the state of facts in this case.

In this connection I beg to call the attention of the court to the case of *People* v. *N. Y. Cent. &c. Ry. Co.*, 156 N. Y., 570,

ch shows that in New York for many years a statute has ted to the effect that a city may lay out a street across a oad track, without paying any damages whatever, and such a statute is constitutional.

lso to *Cook on Corporations*, Sec. 934, p. 2230, 3rd vol., re the learned author says:

Where a telegraph company has a right, under the stat- of a state, to condemn a right of way on the right of way railroad, the damages to be paid to the railroad company nominal, inasmuch as the railroad company owns only a t of way, and such right of way is not interfered with by telegraph company," citing the cases hereinbefore cited, ch he, of course, regards as setling the law upon the sure of damages to which the railroad company is entitled the telegraph company, in a proceeding of this kind.

herefore, I respectfully submit, that the railroad company titled only to nominal damages from the telegraph com- *, and that it is a matter of law, to be passed upon by the* , as was done upon the trial of the case of the *City of go* v. *the Chicago, Burlington & Quincy R. R. and others*, by Circuit Court of Cooke county, Illinois, which ruling was ined, as I have hereinbefore shown, by the Supreme Court linois, 149 Ills., 457, and 166 U. S., 249; the principle in h has been held, as I have hereinbefore shown, by all the ts that have had occasion to pass upon the matter since to apply to cases of this kind.

ilroad and telegraph companies are both public improve- s—both are entitled to exercise the right of eminent do- as agents of the State, upon the theory that, the public e benefited thereby; and a telegraph company is au- zed to go upon the right of way of a railroad company the theory that it was acquired and is held for the public —for the purpose of operating its trains in the carrying ight and passengers; and the telegraph company will messsages, dispatches, and news along its wires, for the

public good; and if this second public use does not interfere with the purposes for which the railroad right of way was first taken and appropriated, then the railroad (an artificial being, created and permitted to have its existence by the grace of a beneficent law) cannot be heard to complain when, under the same law it is required to share so much of its right of way, so obtained, held, and used, with another child of the law. They are joint-heirs of the law—the breath of life being blown into them by the law, for the public good; and all the rights, franchises, and privileges granted them by the law, are given them for the benefit of the public. Hence the arrogant and defiant air and strut of the railroad company illy becomes it.

From the authorities above quoted, it is manifest that the measure of damages to which the railroad company is entitled from a telegraph company in these proceedings is merely nominal. That is a question of law and not of fact, and hence it was error in the Circuit Court to refuse to remand the cause, for this court has no jurisdiction.

There is no error upon the face of the record upon which the plaintiff in error can complain. I will argue that question upon the merits of the case.

Brief Upon Merits.

The errors complained of by the plaintiff in error in its assignment of errors, are to the ruling of the Circuit Court in overruling its motion to dismiss the petition of the defendant in error, filed in the State Court of North Carolina, for the reasons stated in the motion (16 grounds) designated by the court as a demurrer, and dated August 31, 1898 (p. 24 of record); the order of the court directing the clerk to appoint commissioners, dated September 15, 1898 (p. 36 of record); and order of October 24, 1898, sustaining the demurrer of plaintiff in error to the answer of the defendant in error, and refusing leave to plaintiff in error to introduce testimony to sustain the averments of said answer (record, pp.

and the orders of the clerk of the court at Greens
lated September 19, 1898 (p. 36 of record), and October
98 (p. 59 of record). The Circuit Court, in the opinion
ling the demurrer to petition of defendant in error, I re-
ly submit, fully and completely sustains the ruling of
rt in the order of August 31, 1898. In his opinion, p.
he record, His Honor says: "The motion is in effect a
er, and to sustain it, sets out in full 16 grounds of
er. These embrace three general propositions:

hat there is now no law in the State of North Carolina
ng for the condemnation of lands or right of way for
of telegraph companies;

hat if there be such a law in North Carolina, the peti-
the telegraph company in this case has not followed it
tial particulars;

hat the petition is vague and uncertain, in not stating
l by what tenure the lands owned by the railroad com-
e held, and whether only as an easement or in fee.

leave to substitute so much of the opinion of the dis-
ed and learned jurist upon those three propositions, as
ument upon that assignment of error. He properly
the many grounds set forth in the paper into three
heads, and then answers them *seriatim*.

pinion of court, pp. 26 to 33 inclusive, of record.

lition to the reasons given by the learned judge in his
why the petition of the defendant in error should not
n dismissed, I beg to say: Section 1944 of the Code
Carolina of 1883 was, as is shown in the brief of
or appellant, amended by act of 1893, by striking out
the word "that" in the sixteenth line to the word
cted" in the twenty-fourth line of said section. The
tricken out is as follows:

the company has surveyed the line or route of its
road, and made a map or survey thereof, by which
e or line is designated, and that they have located

their said road according to such survey, and filed certificate of such location, signed by a majority of the directors of the company in the clerk's office of the several counties through or into which the said road is to be constructed."

Of course, it having been stricken out, repealed by the act of 1893, it was not incumbent upon the defendant in error to have followed the provisions of a statute repealed.

Section 1952 of the Code was also repealed by act of 1893, as shown by the brief of counsel for appellant, and in its stead the following was substituted:

"That whenever it shall become necessary to condemn any land for the purposes of a *railroad*, that at the time the summons for such condemnation is served there shall also be served by the railroad company a map showing how the line of the road is located on the land sought to be condemned, and a profile showing the depths of the cuts and heights of the embankments on the land so sought to be condemned, and at what points on such land so sought to be condemned, and at what points on such land such cuts and embankments are located."

Section 1946 was also amended by act of 1891, as shown by brief of counsel for appellant, by striking out all after the word "them," in the 21st line of said section, to and including the word "railroad," in the 25th line thereof. The part so stricken out read as follows:

"And in determining the amount of such compensation, they shall not make an allowance or deduction on account of any real or supposed profits which the parties in interest may derive from the construction of the proposed railroad." And substituted in lieu thereof the following:

"Provided, however, that in case the benefits to the land, caused by the erection of said railroad, be ascertained to exceed the damages to such land, then said railroad company shall pay the costs of the proceedings and shall not have a judgment for the excess of benefits over the damages."

It is insisted by the very ingenious counsel for plaintiff in error that the defendant in error is not entitled to and cannot avail itself of the provisions of the amendatory act of 1891, above quoted, for the reason that section 2012 provides that the proceedings for condemnation on the part of a telegraph company, &c., "shall be as prescribed in this chapter for condemning lands to the use of railroads;" and inasmuch as it was not therein provided that it shall be as prescribed in this chapter "*and any amendments made thereto*" for condemning lands to the use of railroads, that under the construction of statutes as given by the courts, the defendant in error cannot avail itself of the amendment of 1891.

I respectfully submit, if that be true then all the labor expended by the learned counsel in trying to persuade the courts that the defendant in error should have done the vain thing of filing a map showing the line of the telegraph company as located on the land sought to be condemned, and a profile showing the depth of the cuts and heights of the embankments on the land so sought to be condemned, &c., is as futile as such map would be unnecessary in a proceeding of this kind; for so much of Section 1944 requiring a survey and map to be made, as I have before shown, and as they show, was entirely repealed by the act of 1893; and Section 1952, requiring maps to be made, &c., was also repealed subsequent to the enactment of Section 2012 of the Code; and the statute enacted in lieu thereof, requiring a map and profile, &c., was also enacted subsequent to the adoption of the Code; and therefore, if for no other reason, their own arguments show that they do not and can not apply to the telegraph company in this proceeding.

Conceding that their argument is sound upon the statutory construction above, and that so much of Section 1946, providing as follows: "And in determining the amount of such compensation they shall not make an allowance or deduction on account of any real or supposed benefit which the parties in interest may derive from the construction of the proposed rail-

road," was repealed by the act of 1891; and in lieu thereof the following was substituted: "Provided, however, that in case the benefits to the land, caused by the erection of such railroad, be ascertained to exceed the damages to said land, then said railroad company shall pay the costs of the proceeding, and shall not have a judgment for the excess of benefits over the damages"—of which the defendant in error can not avail itself; still, as said by his Honor Judge Simonton in his opinion, there is sufficient left in the section unrepealed, providing for the assessment of just compensation to the plaintiff in error. That section provides as follows:

"They (the Commissioners) shall view the premises described in the petition, and hear the proofs and allegations of the parties, and reduce the testimony, if any is taken by them, to writing; and after the testimony is closed in each case, and without any unnecessary delay, and before proceeding to the examination of any other claim, a majority of them, all being present and acting, shall ascertain and determine the compensation which ought justly to be made by the company to the party or parties owning or interested in the real estate appraised by them."

Do what? "Shall ascertain and determine the compensation which ought justly to be paid by the company to the party or parties owning or interested in the real estate appraised by them." If that is not within itself complete, full and perfect authority for ascertaining just compensation to the plaintiff in error, I have never yet seen a statute authorizing the exercise of the right of eminent domain, that was. The truth is that the substituted statute of 1891 is of questionable constitutional authority, for it authorizes the commissioners, in assessing damages, to take into consideration the benefits that would accrue to the land owner by reason of the construction of a public work, and to offset the damages to which he is entitled for the taking of his property by such supposed benefits. Many courts have held that that is in violation of

the constitutional provision, "that private property shall not be taken for public use until just compensation is first paid therefor." So there is nothing in all that, for the defendant in error can't be prejudiced by it.

The petition of the telegraph company (defendant in error), as stated by the learned Circuit Court Judge in his opinion, follows closely, as much as it is possible to do, the provisions of section 2010 of the Code. But they object to the petition because it provides that the telegraph line shall be constructed within four feet of the outer edge of the railroad right of way, or at such other points thereon as may be designated by the railroad company; and in the event the railroad company should require or need any portion of the land occupied by the telegraph company that the telegraph company would move the poles to such other points thereon as may be designated by the railroad company. What right the plaintiff has to complain of that exceedingly fair proposition I am unable to perceive, for, surely it can't be prejudiced by it.

The plaintiff in error furthermore complains that the court erred in sustaining the demurrer of the defendant in error, to its answer, and refusing leave to it to introduce proof sustaining the averments of its answer. The answer is but a rehash of the demurrer or motion which was overruled by the court, with the following additional averments of facts:

Paragraph 7, pp. 48–9. "The complainant's petition states that said poles will be so erected and said telegraph line so constructed and maintained, as not to obstruct the usual travel and business of said railroad company, nor in any way interfere with the operation of said company, nor with any telegraph line now constructed on said right of way; but this defendant denies the truth of said statement and declares that said poles erected, and said telegraph line constructed, and maintained as set out in detail in said petition, will obstruct and hinder the usual travel and business of this defendant, and will interfere with the operations of defendant's said railroad; and with the telegraph line now constructed upon this defendant's pro-

perty; and this defendant further declares that it will not be possible to construct and maintain a line of telegraph upon its property, as set out in said petition, in such manner as not to obstruct or hinder the usual travel upon defendant's railroad."

Again, paragraph 11, p. 60: "Further answering, defendant denies 'that the right of way of this defendant is about 100 feet wide, and that it entends about 50 feet from a line along the centre between the rails of said main track.' On the contrary, defendant states that the strip of land along which its tracks are laid, and trains run, varies greatly in width at different points along its line, and at sundry points along said line included in and covered by the condemnation proceedings of the plaintiff, it is much less than 100 feet in width; indeed, it is so narrow that to erect a telegraph line thereupon in the manner set out in said petition would be impracticable, or at least would grossly imperil the safe operation of said defendant's railroad, and grossly obstruct and hinder the usual travel thereon."

Again, paragraph 12, pp. 51–52 of record, plaintiff in error says: "Said petitioning company makes the following statement, that said defendant railroad company is duly incorporated and doing business under and by virtue of its charter, with a right of way of 100 feet in width, obtained by an enactment of the General Assembly of this State for railroad purposes alone.

"Defendant submits that said allegation is indefinite, uncertain and obscure as to the statement that the right of way of this defendant is 100 feet in width. Defendant repeats the denial of the statement which the defendant made in answer to a similar allegation in said petition. If said allegation means, or is intended to convey the meaning, that the charter of this defendant was obtained by enactment of the General Assembly of North Carolina, then said defendant denies this statement. On the contrary, defendant says that its charter was obtained by an enactment of the General Assembly of

Virginia. But if said allegation means, or is intended to convey the meaning, that the right of way of this defendant was obtained by an enactment of the General Assembly of the State of North Carolina, then this defendant denies the truth of this statement also, inasmuch as is above set forth, much of the property of this defendant, and the strip of land on which its track is laid and its trains run through the several counties specified in the petition of the telegraph company, is held by this company under a fee simple title derived by deeds of purchase from the original owners of said land."

And again, paragraph 12, p. 51 of the record: "Said petition of the telegraph company contains the following allegation: 'Said telegraph lines when constructed will in no way damage the property of said railroad company, nor impair or diminish the value of said right of way for railroad purposes; but that the same will be beneficial to said railroad company and its patrons.' Defendant is advised that said allegation is rather a conclusion of law than a statement of facts, but whichever it may be, defendant meets that allegation with a denial of its truth as a statement of fact, and its soundness as a conclusion of law."

The above extracts from the answer, to which a demurrer was sustained, are all of the allegations of fact in said answer. All the balance of the answer set up matters of law entirely, and the only allegations of fact in said answer are those above quoted. I respectfully submit that as to them the court was right in refusing to allow the plaintiff in error to introduce evidence in their support, because the first allegation of fact was a denial (in paragraph 7 of the answer, pp. 48-9) of so much of the petition of the defendant in error that its poles would be erected and line constructed and maintained, so as not to obstruct the usual travel and business of said railroad, nor in any way interfere with the operation of said company, nor with any telegraph line now constructed upon said right

of way. The defendant in error denies that averment in the petition, and states affirmatively as follows:

"And this defendant further declares that it will not be possible to construct and maintain a line of telegraph upon this property, as set out in said petition, in such a manner as not to obstruct or hinder the usual travel upon the defendant's said railroad."

The statute of North Carolina, section 2007, is: "Any telegraph company chartered or incorporated by this or any other State, shall have the right to construct, maintain, and operate lines of telegraph along any railroad or public highway in the State of North Carolina; *but*, such lines of telegraph shall be constructed and maintained as not to obstruct or hinder the usual travel on such railroad or other highway." Here the undisputed right is by statute given to any telegraph company chartered or incorporated by the State of North Carolina, or any other State, to construct, maintain and operate its lines along any railway in the State, upon one condition only, and that is, that such lines of telegraph shall be so constructed and maintained as not to obstruct or hinder the usual travel on such railroad.

The petition uses the very language of the statute, saying that the telegraph line will be so constructed and maintained "as not to obstruct or hinder the usual travel and business of said railroad company, nor in any way interfere with the operation of said trains, or with any other telegraph line now constructed on said right of way." It was wholly unnecessary for the telegraph company to have averred in its petition that it would not interfere with any other telegraph line. In fact, it was wholly unnecessary for it to have averred that it would construct its lines so as not to obstruct or hinder the usual travel and business of said railroad. *All that was necessary for it to have averred in its petition was that it was incorporated, stating where it was incorporated; that it had been unable to secure by contract or agreement the right to construct its line*

such right of way, and that it had given security for costs. se are the jurisdictional facts under the statute necessary to have averred. (Sec. 2010.) Any other facts were not necessary have been averred, and, therefore, issue upon them is aterial.

ut plaintiff in error asserts in answer "that it will not ossible to construct or maintain a telegraph line upon its erty, as set out in said petition, in such a manner as not to ruct or hinder the usual travel upon defendant's said rail- ." In other words, by their answer and proof, it permit- to make it, they would thwart the express purpose and will e Legislature. There is but one limitation attached to the demnation of so much of the right of a railroad company for se of a telegraph company, and that is, *that just compensation be paid for it.* It is the duty of the court to see to that. ct, were the telegraph company to undertake to construct nes upon the right of way without paying just compensa- , it would be a trespasser.

the case of *California Ry. Co.* v. *Cooper*, 76 Calf., 404, the t uses the following language:

While a corporation which brings such an action is the er party to bring it, because the statute makes it the pro- party, its interest in the action is but incidental and subor- ted in the main purpose (which alone justifies the pro- ing under the Constitution), the main question being to re private property upon just compensation for the public In initiating the proceedings the corporation acts as an t of the State, the Legislature having provided the mode e employment of the power of eminent domain. * * * agency is in the nature of an office; the corporation is a tee prosecuting the proceedings primarily for the State, h by its Legislature has declared the use to be public."

nd in the case of *Lake Shore & Michigan S. R. R. Co.* v. *ago & Western Indiana R. R. Co.*, 97 Ill., 506, the court :

"To warrant the taking of property by one party, already appropriated to a public use, and placing it wholly or in part in the hands of another party for a public use, it is essential that the new use be a different use, and also that the change from the present use shall be for the benefit of the public. Whether the new use be different from the present one is a judicial question for the courts to decide, and where such new use may be in its nature a public benefit, whether the change will be for the benefit of the public is a political question, to be determined by the law-making power.

"This is a case where the plaintiff in error filed an appeal in the Superior Court of Cook county, Illinois, in chancery, against the defendant in error, seeking to enjoin the further prosecution by the defendant of certain proceedings pending in the County Court of Cook county, to which the plaintiffs in error were made parties defendant. The appellee alleged that 'if the road of the defendant be constructed as proposed and operated, the business thereby conducted over these premises will be almost doubled; that such increase will so hinder and embarrass defendant in transferring freight and running trains as to cause an injury constantly increasing, and not susceptible of compensation by damages in a case at law, and would impair, infringe and destroy the franchise of complainant.'

"The appellee also charges that the construction and operation of defendant's road, as proposed, would under the circumstances necessarily be a nuisance of a serious and irreparable nature, in the delay to business and increased dangers to life. The relief sought is a perpetual injunction forbidding the condemnation proceedings and the construction of any road over the premises and the taking possession of any part of the premises. * * * The right to exercise the power of taking property for public use is one of the recognized powers of sovereignty, and is one of the attributes inherent in the States. The power to declare under what circumstances that right may be exercised, and to provide the mode of its exercise, was conferred upon the General Assembly by that clause which

l in that body (the legislature) power of the State. That
· is not granted, but is merely recognized as one of the
utes of a State. The authority expressly given such cor-
ons to cross and intersect intervening railroads at any
on its route is by necessary implication a declaration that
bordination of the premises already occupied by a rail-
to the use of another railroad for a crossing, is a change
use which the public good demands in all cases where
w company can afford to pay full compensation therefor;
nless it be the law, that upon failure to agree in that re-
the company thus crossing is to select the point of cross-
nd prescribe the manner of crossing, as the basis for the
priate compensation to be paid therefor, no new railroad,
our law, can lawfully locate its road upon any route
ver involving the crossing of any intervening railroad,
nt the consent of the owners of such railroad. The
al Assembly certainly never intended to bring about
a result. If the law be otherwise, the passage of the
al Railroad Act was an idle ceremony. * * * By
ssage of these two statutes, the General Assembly hav-
uthorized appellee to select its own route, and to cross
tervening railroad at any point upon its route, and to
mn the right of way across such premises, and having
n substance declared that such condemnation is for a
use, and this being, as already stated, a political ques-
hich the General Assembly has the sole power to deter-
the courts have no power to review this determination."
injunction in this case was refused.

sist, therefore, under that authority and the Act of Con-
&c., that any testimony offered by the plaintiff in error
ve the allegations of the seventh paragraph of its answer,
have been wholly irrelevant and incompetent, and there-
nadmissible, because the effect, if such testimony were
uced, would be to have the courts declare that the Acts
Legislature and of Congress, in the language of the
"was an idle ceremony."

5

Act of Congress, entitled, "An Act to Aid in the Construc-struction of Telegraph Lines, and to Secure to the Government the use of the same for postal, military, and other purposes, approved July 24,1886." Rev. St., Sec. 5263 and Sec. 3964.

Under Sec. 5263 it is provided that "any telegraph company now organized, or which may hereafter be organized under the laws of any State in this Union, shall have the right to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States, which have been or may be hereafter declared such by act of Congress, and over, under, and across the navigable streams or waters of the United States; provided, that such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post roads."

Sec. 3964 provides as follows:

"The following are established post roads. * * * All railroads or parts of railroads which are now, or hereafter may be, in operation."

I insist, therefore, under the above cited authorities and acts of Congress, that any testimony offered by the plaintiff in error to the allegations of the seventh paragraph of its answer would have been wholly irrelevant and incompetent, and therefore inadmissible, because the effect would be to render the statutes, both State and Federal, in the language of the court above cited, "an idle ceremony."

The Supreme Court of Louisiana, in the case of *Postal Telegraph-Cable Co.* v. *M. L. & T. R. R. Co.*, 49 La. Ann., 58, 21, S. E. Rep., 183, held that the Louisiana statute authorizing proceedings of this kind was auxiliary to the acts of Congress above cited.

In the case of *C. R. I. & P. R. R. Co.* v. *Town of Lake, et als*, 71 Ills., 336, the court says:

he power to determine in any case whether it is needful
rcise the power of eminent domain, must rest with the
tself, and the question is always one of strict political
:ter, not requiring *any hearing upon the facts, or any*
l determination. (Cooley, on Constitutional Limitation,
In the case of *Swann* v. *Williams*, 2nd Mich., 327, in dis-
g that question it is well said by the court: 'The power
e government, respecting public improvement, is sove-
power; it rests within the purview of the legislature to
nine when and in what manner the public interest re-
the exercise, and with the reason for the exercise of that
tion the court will not interfere. * * * As we un-
nd the argument of appellees, they claim that they, as a
ration, have under the laws of eminent domain, taken
old this property for public use and purposes, and when
pellees undertake to invoke the same law, and take the
rty for public services, they (the appellees) have a supe-
quity, and hence the courts ought and should interfere.'
'e do not regard the position taken by appellees as sound
able. We cannot believe the right of property more
in a chartered corporation than the same right in the
f a private citizen—both must stand on the same foot-

is impossible upon principle to make a distinction be-
rights to land acquired by a corporation, and letters
obtained by a citizen from the government. Over each,
me sovereign power exists. The same great law of pub-
cessity, requiring that private rights should yield to
exigencies, must be applied to both. The citizens and
rporation alike accept a grant of land with the reserved
esting over and upon it of the State to retake it at such
as the public necessity may require, upon just compen-
being made. * *
he whole policy of this country in relation to public
ays, railroads and canals, under which lands have been
nned, rests upon this power. * * The doctrine con-

ended for would have a tendency to stop the improvement and development of the country."

In the case of *Richmond R. R. Co.* v. *Louisa R. R. Co.*, 13 How., 71, the court said:

"The grant of a franchise is of no higher order, and confers no more sacred power, than a grant to an individual, and when the public necessities requires it, the one as well as the other may be taken for public purposes, on making suitable compensation."

In *West River Bridge Co.* v. *Dix and others*, 6 How., 507, the court said:

" * * A distinction has been attempted in argument between the power of the government to appropriate for public uses the property which is corporate, or may be said to be in being, and the like power in the government to resume or extinguish a franchise. The distinction thus attempted we regard as a refinement which has no foundation in reason"—citing *Austin Water Power Co.* v. *Boston & Worcester R. R. Co.*, 23 Pick., 389.

In 73 Mich., 953, the court says: "The legislature may appropriate property under the power of eminent domain, by an act specifying the property acquired and the use to which it is to be devoted. (*Boom Co.* v. *Patterson*, 98 U. S., 403; *Lewis on Eminent Domain*, Sec. 442.) And when it has declared the necessity for taking certain property by regular enactment, such an act must be held to be for this purpose, the law of the land, and no further finding or adjudication can be essential unless the constitution of the state expressly so provides; or it may declare the purpose for which the property is to be taken and leave the selection of the property to be taken to whatever agencies it pleases, for it has the sole power to judge what persons, corporations or other agencies may be properly clothed with this power, subject only to the limitations imposed by the constitution."

Statutory Provision, a Condition Subsequent.

ondition mentioned in Section 2007 of the Code of arolina, namely, "But such lines of telegraph shall be ucted and maintained as not to obstruct or hinder the vel on such railroad or other highway," is a condi- *equent*, like that in a deed to a railroad company of depot or warehouse purposes, conditioned that the makes such improvements on the land. Of course the could not make the improvements until it got posses- he land. Neither could the telegraph company con- lines until it had secured the right of way, by con- greement, or until after condemnation proceedings. truction of the lines in the manner set out in the Code, h a condition subsequent as that of the construction road company of the improvement specified in the ich are the considerations of the deed. The telegraph having secured the right, by condemnation proceed- construct its line upon the right of way of the rail- *t* construct it so as not to obstruct or hinder the el on the railroad or other highway. If it does, it joined. If the railroad company suffers extraordi- ages by the unskilled construction of the line, it can a special action for damages against the telegraph

The answer does not allege insolvency of the telegraph

answer by the defendant was authorized, it was by Section 1945 of the Code, which provides: "The l hear the proof and the allegations of the party, and cient cause is shown against granting the prayer of on, it shall make an order for the appointment of ners." I contend that this section does not apply to aph law as embraced in Section 2007, *et seq.*, but ne to the condemnation by a railroad company of of individuals as provided for in Section 1944, which vs:

"For the purpose of acquiring such title, the said company, or the owners of the land sought to be condemned, may present a petition praying for the appointment of commissioners of appraisal, to the Superior Court of the county in which the real estate described in the petition is situated; such petition shall be signed and verified according to the rules and practice of such court, and if filed by the company it must contain a description of the real estate which the company seeks to acquire, and it must in effect state that the company is duly incorporated, and that it is the intention of the company in good faith to construct and finish the railroad from and to the places named for that purpose in its article of association or in its charter; that the whole capital stock of the company has been in good faith subscribed as required by this chapter, and by the terms of the charter; that the company has surveyed the line or route of its proposed road, and made a map or survey thereof, by which said route or line is designated, and that they have located the said road according to such survey, and filed such certificate of such location, signed by a majority of the directors of the company in the clerk's office of the several counties through or into which said road is to be constructed. (All that portion providing for a survey and map, and certificate of the directors of the company, was repealed by the act of 1893.) That the land described in the petition is required for the purpose of constructing and operating the proposed road; and that the company has not been able to acquire title thereto, and the reason of such inability. The petition, whether filed by the company or the owner of the land, must also state the names and places of residence of the parties, so far as the same can by reasonable diligence be ascertained, who own or have, or claim to own or have, estate or interest in said real estate; and if any such persons are infants, their ages, or as near as may be, must be stated; and if any such persons are idiots or persons of unsound mind, or are insane, that fact must be stated, together with such other allegations and statements of liens or incumbrances on such

real estate as the company or the owner may see fit to make. A copy of such petition, with a notice of the time and place when and where the same shall be heard by the Superior Court, must be served on all persons whose interests are to be affected by the proceeding, at least ten days prior to the hearing of the same by the said court."

Under the provisions of that section the railroad company was required to present a petition *praying* for the appointment of commissioners of appraisal, to the Superior Court of the county in which the real estate described in said petition is situated.

Such petition should be signed and verified according to the rules and practice of said court, and if filed by the company it must contain (1) a *description of the real estate*; (2) state that the company is duly incorporated; (3) that it is the intention of the company in good faith to construct and finish the railroad from and to the places named for that purpose in its articles of association or in its charter; (4) that the whole capital stock of the company has been in good faith subscribed (omitting that portion which has been repealed); (5) that the land described in the petition is required for the construction and operation of the proposed road; (6) that the company has not been able to acquire title thereto; (7) the reason of such inability; (8) must state the names and places of residence of the parties, so far as the same can by reasonable diligence be obtained; (9) if infants their ages, or as near as may be, must be stated; (10) if idiots or persons of unsound mind, or unknown, that fact must be stated; (11) together with such other allegations or statements of liens or incumbrances on such real estate as the company or owner of said real estate may see fit to make.

All these distinct averments must be made in the petition by a *Railroad Company* condemning the lands of individuals for its use.

Section 1945, provides: On presenting such petition to the Superior Court, as aforesaid, with proof of service of a copy therefor, and notice as aforesaid, all or any of the persons

whose estates or interests are to be affected by the proceeding, may answer such proceeding and show cause against granting the prayer of the same, and may disprove any of the facts alleged in it. The court may hear the proofs and allegations of the parties, and if no sufficient cause is shown against granting the prayer of the petition, it shall make an order for the appointment of three disinterested and competent freeholders, who reside in the county where the premises are to be appraised, for the purposes of the company, and shall fix the time and place of the first meeting of the commissioners."

I insist that section 1945 providing for an answer applies to the petition of a Railroad Company, and not that of a Telegraph Company. Because section 2010 requires only one averment while section 1944 requires eleven to be made by a railroad company and each is a jurisdictional fact.

If, however, the court should hold that that provision applies to the proceedings on the part of a telegraph company, then we go back to section 2010 to see what necessary averments must be made by the telegraph company in its petition, and there we find that the telegraph company, in the event it fails on application to secure, by contract or agreement, such right of way for the purposes aforesaid over the lands, privileges or easements of another person or corporation, it shall be lawful for it, first giving security for costs, "to file its petition before the Superior Court for the county in which such lands are situate, or into or through which such easement, privilege or franchise extends, *setting forth and describing the parcels of land, privilege or easement over which the right of way, privilege or right of use is claimed; the owners of the lands, easement or privilege, and their places of residence, if known, and if not known that fact shall be stated; and such petition shall set forth the use, easement or privilege, or other right claimed, and must be sworn to.*"

Necessary Averments in a Petition of a Telegraph Company.

Now, mark you, under this section, which is the chart and

compass by which the telegraph company must be guided its petition, the following facts only need be stated, to-wit: "setting forth and describing the parcel of land, privilege or easement over which the way, privileges or right of use is claimed; the owners of the land, easement or privilege, and their places of residence, if known; and if not known that fact shall be stated; and such petition shall set forth the use, easement, privilege or other right claimed, and must be sworn to." And providing further, "if the use or right sought, be over or upon an easement or right of way, it shall be sufficient, to give jurisdiction, if the person or corporation owning the easement or right of way be made a party defendant, provided that only the interest of such parties as are brought before the court shall be condemned in any such proceeding; and if the right claimed be through or upon an easement or right of way which extends into or through more counties than one, the whole right and controversy may be determined in one county into or through which such easement or right of way extends."

Now, let us simmer down the necessary jurisdictional facts provided for in that section, to be stated in the petition; and it embraces only the following: "And such petition shall set forth the use, easement, privileges or other right claimed, and must be sworn to." That is all. Any other averments or allegations in the petition are wholly unnecessary and immaterial, and any others made in the petition, being immaterial, no issue could be taken upon them, and no proof was necessary or admissible by the court to establish the contrary. Therefore, the court did not err in refusing to permit the plaintiff in error to introduce proof to sustain its allegations.

Besides that, it is a fact that the court will take judicial knowledge of, that the construction of a telegraph line in the manner set out in the petition of the defendant in error, would not "obstruct or hinder the usual travel on such railroad," no more than a pedestrian upon a side-walk of a city would obstruct the running of a street car.

In New York, the court has taken judicial notice of the fact that banking hours are from 10 A. M. to 3 P. M. (115 N. Y., 250); that city lots in New York city have a certain depth, and that buildings on corner lots often cover the whole lot (85 Hun., 217); that a certain town is in a certain county (131 N. Y., 617); that a trolley car can be stopped in less than 100 ft. (31 N. Y., Supp., 441); that streets in New York city run in a certain direction, and begin and end in a certain place (27 N. Y., Supp., 304); that the pole and front wheels of a wagon may turn at right angles to the wagon (41 N. Y., Supp., 152.)

The Supreme Court of Alabama, in the recent case wherein the Mobile & Ohio Railroad Company was appellant, and the Postal Telegraph-Cable Company defendant, hereinbefore cited, used the following language:

"It is averred in the petition that the proposed line of telegraph will be constructed in the manner (fully stated) so as to prevent any possible interference with any work or use of said railroad. It is proposed to so construct the line that it will not produce any material interference with the free exercise of the franchise of the railroad company, nor extend to that part of the right of way which is in actual use. *Common knowledge teaches that there is ample space on the hundred feet of the railroads right of way for two or more telegraph lines, without obstructing the free and ample use of it for railroad purposes.*"

The opinion in that case furthermore is: "The remaining grounds of the demurrer, 5, 6, 7, 8 and 9, are that there is no sufficient description given in the petition, of the right of way proposed to be condemned. These grounds contradict the very full and definite allegations of the petition. It is difficult to conceive how ampler and freer averments of what is proposed to be done by petitioner in establishing its lines, could have been made. The defendant, on these averments, as it was furnished with sufficient data to do so, entered into a minute calculation by its witnesses, of the number of feet of land that would be occupied by petitioner, in the erection of its poles throughout the whole length of the line, the exact spots

where the poles would be placed, and whether on the one side or the other of the railroad: where the necessities and conveniences of the railroad would be best subserved, could not, of course, be distinctly stated, nor was it necessary to do so. The same objection was raised against a similar petition, in the case of *N. O. & T. R. R. Co.* v. *S. & A. T. Co.*, 53 Ala., 211, and was held not to be well founded. It would seem after this that there was no ground for complaint, for want of information as to what part, and how much of defendant's right of way would be necessary for the establishment of the line of the telegraph company. * * * The plaintiff in its petition proposed a condemnation for its use, such as would not obstruct or hinder the railroad company in its business, or in its use of such right of way: that it would erect its poles 26 feet long above the ground, at a distance not less than 30 feet from the outer edge of said railroad track, and in the event said company should at any time desire to change the locality of its track or construct new tracks or side-tracks, plaintiff would remove its poles at its own expense to any other point on the right of way as might be agreed upon between plaintiff and defendant railway."

The Supreme Court of the State of Tennessee, in a case between the same parties above referred to, uses the following language:

"A telegraph line along a railroad line is not only a convenience, but a necessity, and is very properly treated as a railroad appurtenance.

"A railroad company may, therefore, construct a telegraph line along its right of way, or permit another to do so, but it acquires and can confer no exclusive right to do so." *West. Union Tel. Co.* v. *Baltimore*, 19 Fed. Rep., 660: *Id.* v. *Am. Union Tel. Co.*, 38 Am. Rep., 781: *Id.* v. *Baltimore & S. W. R. R.*, 2 Fed. Rep., 1: *Pensacola Tel. Co.* v. *West. Union Tel. Co.*, 3 Otto., 24: *Am. & Eng. Ency. Law*, vol. 3, 886, 1st ed. Under this view of the estate and interest which the railroad company

has in its right of way, it is difficult to see how the damage sustained by the road can be anything but nominal. * * * This is simply a case where the railroad is not using the space occupied by the posts and under the wires, and which it cannot convey to another for any purpose, in which case only nominal damages arise.

"It is said with much earnestness, and some degree of plausibility, that it would be unjust to allow a telegraph company to plant its poles along a right of way, when the railroad company had expended thousands of dollars to keep it free from obstructions, and yet pay nothing for the privilege; but this view is more specious than sound, for a railroad company must incur the expense for its own purposes, whether the telegraph line is there or not, and must keep its right of way clear of obstructions, whether it is occupied by a telegraph line or not; and there is no greater burden or expense because of the presence of the telegraph line."

In a case between the same parties, the Supreme Court of Illinois, 173 Ills., p. 508, says:

"Third: Motion was made to dismiss the petition and the point was raised in the trial that the appellee's amended petition does not contain a sufficient description of the property sought to be appropriated, nor the proposed line or route of the telegraph. It is claimed by the appellants that the petition does not set forth precisely what it demands, and just what portion of the defendant's property it proposes to take or condemn. The petition is not justly subject to the charge thus made against it. It is sufficient to describe the land condemned with reasonable certainty. (*Springfield and Ills. S. E. Ry. Co.* v. *Turner*, 68 Ills., 187; *C. and E. R. R. Co.* v. *City of Pontiac*, 169 Ills., 155.)

"An examination of the allegations of the petition will show that the property sought to be condemned is described with reasonable certainty, where a telegraph company seeks to condemn a part of the right of way of a railroad company, the

nber and size of the telegraph poles should be stated. *room* v. *N. Y. Tel. Co.*, 49 N. J. L., 624.) Data should be en by which the location of the telegraph poles may be ermined, and the intended height of the poles, as well as the nber and size of the cross-arms they are to bear, should be icated. (*N. Y. & N. J. Tel. Co.* v. *Broom*, 50 N. J. L., 442.) Here the petition describes the right of way upon which petitioner seeks to locate its lines, as the railway of the endant running from East St. Louis to Cairo, in the manner forth in the statement preceding this opinion. The petition n states that the petitioner desires to construct a line of graph over and above said right of way, for its entire gth, from its commencement in East St. Louis to its ter- nal in Cairo; that a portion of said right of way lies in kson county; that the petitioner would locate a line of graph upon said right of way, and does not seek to acquire fee to any lands, or the right to use the same for any pur- e, but to locate a telegraph line thereon and to repair and ntain the same and to use the same for telegraph purposes; t it desires one line of poles; said line to be constructed of best material and most approved methods; that poles will not less than 25 ft. long and 1 ft. in diameter at the base, and set in the ground at a depth of not less than five feet; that n the poles will be attached suitable arms 6 feet in length, ened near the top of the poles, and insulators on which be strung at or near the upper end, wires of suitable ma- al, and sufficient in number to enable the petitioner to mptly transmit telegraph messages; that the poles will be about 175 feet from each other, and be erected on the nt of way at a distance of not less than 25 feet from the er edge of the railroad track, and upon the east side of said k, or at such points as may be agreed upon by the Tele- ph Company and the Railroad Company operating the same; t in places where the line crosses the track, or where it is essary to do so to prevent interference with the work of said lroad Company, the poles shall be so high above the ground

as to permit the wires to be strung so far above as to prevent such interference therewith; and that said poles will be erected on said telegraph line and so maintained as not to obstruct or interfere with the business or use of said railroad, or hinder the usual travel or traffic thereof, or in any manner obstruct the use of, or come in contact with, the line of any other telegraph company along said railroad. The petition thus sets forth every detail necessary to describe the location of the telegraph line; it designates the railroad track as a fixed monument, and gives the height of the poles, the diameter of the poles, the distance of the poles from the track, the distance of the poles from each other, and the length of the cross-arms. This covers every reasonable demand of the statutes. It is true that the petition does not state how many wires are to be placed upon the cross-arms except that their number will be sufficient to enable the petitioner to transmit telegraph messages. It is no more required that the petitioner should state the number of wires to be strung on the cross pieces, than it is for a railroad company, in condemning land for a right of way, to designate how many railroad tracks it will put upon the strip 100 ft. wide, which it seeks to condemn for its railroad. It is assumed that it will not put down any more tracks than the condition of its business will warrant. So here it may be assumed that the telegraph company will not string any more wires than its business will demand. It seems to be conceded that the construction of the petitioner's telegraph line will require the erection through the whole length of the railroad right of way, about 4,500 telegraph poles. To locate such poles by an individual description, so as to designate by metes and bounds the exact spot occupied by each, would require the insertion in the petition of 4,500 separate descriptions. The very statement of such a proposition shows its unreasonableness.

"Fifth. It is further urged that the petition fails to show that the proposed telegraph line will not incommode the public use of the railroad. The alegations of the petition as already

ve referred to, show that this objection is not well taken
h allegations must be considered in connection with the
cription of the location of the telegraph line. The location
the line, as indicated in the petition, shows that the public
of the railroad would not be seriously incommoded."

beg to call the attention of the court to the fact that
only difference in the petition of the defendant in error,
telegraph company, in this cause, and that in the case in
nois, is that in the Illinois case, as well as in the Ala-
ma and Tennessee cases, the petitioner set out that it
uld construct its lines not nearer than 25 feet (and in
case 30 feet) from the outer edge of the right of way;
ereas in the case at bar the petition sets out that its lines
l be constructed near the outer edge, not further than four
t from the outer edge of the right of way. That is the only
ference. Hence I say, quoting the language of the Supreme
urt of Illinois: "The location of the line, as indicated in
petition, shows that the public use of the railroad would
be seriously incommoded." In other words, the court
k judicial notice of that fact, as did his Honor Judge Simon-
, and would not postpone the rights of the defendant in
or by the trifling demand for leave to introduce testimony
prove the allegations of the answer upon which no proof
uld be admitted.

So far as the denial in the answer to the petition, that it
uld not interfere with any other telegraph line, is concerned,
eg to say that that is an immaterial averment of the peti-
n, and the telegraph company, if necessary, could answer
itself. It may be that it was answering then, but if so,
e the ghost of Banquo, it appeared in a very questionable
ape. The law is: "If it clearly appears in any case that
ere are no disputed facts bearing on the matters in issue,
l the verdict is manifestly right, and especially where the
ord shows that no other result would be obtained by a new
al, the appellate court will not reverse the same, although
ere may have been some technical inaccuracies in the in-

structions given to the jury." (Garland on Fed. Prac., sec. 358.)

The other allegations of fact in the answer, as hereinbefore shown, were wholly immaterial, and those of law the court passed upon. Upon them no proof was admissible.

There is one other point on which the plaintiff in error puts much stress, and that is that section 2010 of the Code of North Carolina provides as follows:

"Providing that only the interest of such parties as are brought before the court shall be condemned in any such proceeding; and if the right claimed be over or upon an easement or right of way which extends into or through more counties than one, the whole right and controversy may be heard and determined in one county into or through which such easement or right of way extends."

And avers in its answer that much of its right of way was secured by deeds of conveyance in fee simple, and therefore, the same is not an easement; and undertakes to draw a distinction between an easement and a right of way, holding that it is only an easement which can be condemned in any county other than that in which it is; but when it comes to the lands held by the railroad under deeds of conveyance, that there must be a separate proceeding in each county, to condemn.

In the first place, that distinction is drawn as fine as a cobweb—too fine to be seen with the naked eye; so fine that evidently the Legislature which enacted it did not see it, and therefore did not conceive or imagine that the technical construction placed upon it by the astute and ingenious counsel for the plaintiff in error would ever be made. In that, of course, they were mistaken, from the fact that it has been made—just like it was once made in the Supreme Court of Appeals in the State of Virginia, in the case of *Postal Telegraph-Cable Co.* v. *Norfolk & Western R. R. Co.*, 88 Va.,—that the language used in the Virginia statutes authorizing telegraph companies to construct their lines "along and parallel to the railroads," did not mean along and upon the right of

but just off of and parallel to the right of way—not-
tanding the fact that it was providing for a condemna-
gainst the railroad company. Strange to say, that through
ngenious arguments of counsel, the Supreme Court of
nia held with them. But that case has recently been
uled by the present court, thus showing that if legislators
draft bills affecting the rights of railroads, do not measure
words with the same degree of precision that a pharma-
oes the proportions of poisonous compounds for an in-
the railroad attorneys will hold up their hands in holy
r, and declare that the most unreasonable construction
d be placed upon a statute, and that the Legislature did
ean what it said.

eg leave to refer the court to the opinion of his Honor
e Simonton on this question, as a full and complete an-
to the same. See opinion, pp. 66–7–8–9 of record.

the case of *North Missouri R. R. Co.* v. *Grott*, 25 Mo., 542,
ourt said:

he objections of the appellant to the proceedings in the
it Court, and relied on here for reversal of the judgment,
rst, that the defendant was denied the right of trying
sue made on the statement in the petition, that the road
l hills and valleys, and for that reason a width of 150
as necessary. The company was incorporated March 3,
The seventh section of its charter gave it the right to
a strip of land the whole length of the road, not exceeding
et in width, providing that in passing hills and valleys the
ompany may be authorized to extend the said width in
to effect its objects. * * The petitioner averred that
ad through the defendant's land passed through hills
alleys, and that a width of 150 feet was necessary for the
uction of the road. This statement was made no doubt
report of the engineer, whose judgment in that matter
lled the plaintiff, and the allegations was not traversible
defendant.

"A railroad company purchasing land for a railroad acquires an absolute fee simple, but such fee simple is acquired solely for the purposes and uses of the railway. *Norton* v. *London, &c.*, L. R., 9, Ch. d., 622; also L. R., 13, Ch. d. 268. Section 1957, Code N. C."

It is very evident that the legislature of North Carolina did not weigh its words, otherwise it would have used the expression "right of way" instead of easement or right of way; for it is immaterial how the right of way is acquired, and it is a fact that there is not a railroad company anywhere in all this country but what holds its right of way in three different ways—by condemnation proceedings, by gift and by purchase; and it is not reasonable to suppose that the legislature intended that any distinction should be drawn as to the tenure by which the railroad held its right of way. The proposition is preposterous. It is a right of way, at last; it matters not how it holds it, as was stated by His Honor, Judge Simonton, and the legislature intended by that statute to authorize the construction of telegraph lines thereon—it matters not how its tenure is held; and there is but one proceeding which could be had in any county in which or through which the railroad passes. The rule for the construction of statute is: "All its parts are to be considered, and such construction adopted as will give force and effect to all its clauses, unless they are clearly repugnant to each other." (Note on p. 541. Brown on Jurisdiction.) "But after all," says Shaw, Chief Justice, in *Hilton* v. *Norton*, 6 Cush., 680, "the best plan is to take the entire provisions of the act and ascertain it possible, what the legislature intended."

Construing this statute from a sensible standpoint, I beg to call the attention of the court to the following provision of Section 2010, just above the proviso in which the bug-a-boo is found by the plaintiff in error: "It shall be lawful for such telegraph company, first giving security for costs, to *file its petition* before the Superior Court for the county in which such lands are situated, or into or through which such easement, privilege or franchise extends," &c. That itself is amply suf-

nt to authorize the prosecution of but one proceeding nst the same railroad company in the State.

the case of *Railroad Co.* v. *Tel. Co.*, 173 Ill., 508, *supra*, the t was made in the court below, which was overruled, and ted upon in the Supreme Court that under the statutes of ois, a condemnation proceeding could not be had in Jackson nty for the whole line of the road running through eight en counties, from Cairo to East St. Louis, in the County rt; but the Supreme Court of Illinois did not so hold. The ites of Illinois (1st Starr & Curtis Stat., 483) provided: "It be lawful for a party authorized to take or damage the erty so acquired, to apply to the judge of the Circuit Court ounty Court, either in vacation or in term time, where the property or any part thereof, is situated, by filing notice me and place of presenting such petition." The court held r that statute, that there need be but one proceeding, even gh that was in a court of limited jurisdiction, to condemn right of way of a railroad throughout its entire length in State.

the case at bar, the Code of North Carolina, independent ie proviso as before quoted, is, "to file its petition before Superior Court for the county in which said lands are te, or into or through which such easement, privilege or chise extends." The proviso is, "and if the right claimed ver or upon an easement or right of way which extends more counties than one, the whole right and controversy be heard and determined in one county into or through h such easement or right of way extends."

is evident that the legislature meant to give the telegraph pany the right to condemn the right of way of railroads in county in which the right of way ran, in one proceeding he entire State. And I venture to say that no man—no er, even—ever read that statute and put the construction it that has been done by the counsel for the plaintiff in r, in this proceeding.

he point is attempted to be made by plaintiff in error that

two petitions were filed by the defendant in error—that t
one relied upon the statutes of the State, and the other up
the acts of Congress. The last petition, as shown by t
record, is an amended petition, filed by leave of the court, a
the only difference is in setting out that we had accepted t
provisions of the act of Congress of July 24, 1866, and
sired to construct a line to Winston. It claimed no right
the petition to maintain the proceedings under the acts
Congress, but as said by the Supreme Court of Louisiana
the case of *Postal Telegraph-Cable Co.* v. *M. L. & T. R. R. C*
49 La. Ann., 58; 21 S. E. Rep., 193; in construing the Lou
iana statute, holding that the words "along and parallel wit
meant "along and upon" the right of way of railroa
that the statute was auxiliary to the acts of Congress of Ju
24, 1866, authorizing the construction of telegraph lines alo
post roads.

ORDER OF CIRCUIT COURT OF SEPTEMBER 15th, 1898.

Counsel for plaintiff in error lay much stress upon the f
that Judge Simonton, in his order of September 15th, 18
directed his clerk to appoint the commissioners, and nam
the time and place when they should first assemble, and p
side at the meeting.

Section 1945 of the Code, providing for the appointment
commissioners, says:

"The court shall hear the proofs and allegations of the p
ties, and if no sufficient cause is shown against granting t
prayer of the petition, it shall make an order for the appoi
ment of three disinterested and competent freeholders w
reside in the county where the premises are to be apprais
for the purposes of the company, and shall fix the time a
place for the first meeting of the commissioners."

The order of the Judge was (record, p. 36):

"That S. L. Trogdon, Esq., clerk of this court at Greensbo

Carolina, do appoint three disinterested and competent
olders, resident in this district, and summons them before
That the said persons so selected shall act as commis-
rs to assess the damages which the Southern Railway
pany may sustain by reason of the erection of the tele-
poles and the stretching of the wires thereon of the
Telegraph-Cable Company, as proposed in the petition
d company to this court. That the said commissioners
take before the said clerk the oath prescribed in section
of the Code of North Carolina, and shall proceed in all
cts as required in said Code in assessing such damages,
ating and assessing such compensation as may be just
id Southern Railway Company by reason of the premises.
aid commissioners shall hold their meetings in the court-
of the United States, in the city of Greensboro, over
meetings said clerk shall preside, and they are author-
nd empowered to take such testimony in respect to the
lamages to the said Southern Railway Company as they
leem pertinent; not, however, extending their inquiry as
benefit to be derived to the telegraph company, or the
thereof to it. The first meeting of the commissioners,
ich the said clerk shall give due notice to them and to
rties, shall be held ten days after notice of their appoint-
has been served on the parties to this cause. After hear-
e evidence and reaching their conclusion, the said com-
oners shall reduce their award to writing and sign and
he same and file it with the said clerk of this court at
nsboro."

view of the statutes of North Carolina, and the law gov-
g the measure of damages in cases of this kind, I respect-
submit that there is no error in this order. The conten-
of the counsel for plaintiff in error that the court
in instructing the commissioners not to consider any
its that would accrue to the Telegraph Co. by reason of
onstruction of its lines upon the right of way of the rail-
is surely without merit; for it has never been held, so

far as I have been advised, by any court that any corporation condemning land for its use should be required to pay the land owner the full benefits that would accrue to it, by reason of such condemnation. Such a rule would be requiring the corporation to discount and pay in advance to the land-owner all the benefits that it could possibly derive in the future from such condemnation. The question is, not what the telegraph company would be benefited, but what the railroad company would be damaged by the construction of the telegraph line in the manner set out in the petition, as stated by the Judge.

As was said by Mr. Justice Chalmers, of the Supreme Court of Mississippi, in the case of *Sullivan* v. *Lafayette County*, 61 Mass., 271:

"He (Sullivan) is entitled to his own loss, and not to the county's gain; he obtained everything he is entitled to when he was made whole, and has no concern with the question of how much the county has gained. The measure of his damages is only that he gets the difference between the value of his property before and after the appropriation, charging nothing, however, against him, because of the enhanced value of his lands arising from the improvement made. A man who owns a narrow pass between two mountains cannot estimate his damages when it is taken for a road by the cost of tunneling under one of the mountains or surmounting the other; how much it may be worth to the public to build a road through his land is a question with which he has nothing to do."

On the same point see the case of *Union Depot* v. *Brum*, 31 Minn., 297, and Mills on Eminent Domain, Section 173.

Counsel for plaintiff in error complain that the orders of the clerk, as they call them (they are not orders, they are simply notices issued by the clerk to the commissioners) do not recite the fact that the commissioners are disinterested and competent freeholders. Such objection is too flimsy to require no-

he commissioners themselves, but only in judg-
ourt upon the award.

f the Code of North Carolina Amended after the Institution of this Suit.

ature of North Carolina of 1899, after the insti-
ceedings in this cause, amended Chapter 49 of
North Carolina, as follows (chapter 64, page 199,
of North Carolina of 1899):

AN ACT

To amend Chapter 49 of the Code of 1883.

al Assembly of North Carolina do enact:

That Sections 2007, 2008, 2009, 2010 and 2012 of
f the Code of 1883, be amended by inserting the
lephone" after the word "telegraph" wherever
sed in said sections.

at Section 2010 of said chapter 49 be further
ollows: By striking out all after the word "pro-
e 19 in said section, and inserting the following
f: "that only the interest of such parties as are
re the court shall be condemned in any such pro-
d if the right of way of a railroad or railway
ends into or through more counties than one, the
and controversy may be heard and determined
y into or through which such right of way ex-
ided, further, that it shall not be necessary for
to make any survey of or over the right of way,
y map or survey thereof, nor to file any certificate
n of its line by its board of directors."

at Section 2011 of said chapter 49 be amended as
striking out the word "easement" in line 9 of
and insert in lieu thereof the words "right of

ded as follows: By inserting between the words "chap- and "for," in line 10 of said section, the following: "or mendments thereto."

. 5. That all laws in conflict with this act are hereby led.

. 6. That this act shall be in force and effect from and its ratification.

the General Assembly, read three times and ratified, this ay of February, A. D. 1899.

C. A. REYNOLDS,
President of the Senate.

H. G. CONNOR,
Speaker of the House of Representatives.

as it will be seen that the legislature of North Carolina, zable, no doubt, of the technical pleas entered by this iff in error in this proceeding, so contrary to the policy e state, made the above amendment, which effectually nates every single objection made by the plaintiff in error procedure on the part of the defendant in error.

o not deem that the amendment was necessary, in order intain this proceeding, but, it having been made by the ature, the defendant in error is entitled to its benefits: e rule is, "that there is no such thing known as a vested in a public law which is not in the nature of a grant, and gislature may repeal all laws which are not in the nature ntracts or private grants." *Dobbins, et als*, v. *First nal Bank*, 112 Ill., 533.

o person can claim a vested right in any particular mode ocedure for the enforcement or defence of his rights. e a new statute deals with procedure alone, *prima facie*, olies to all actions—those which have accured or are ng and future actions. If before final decision a new s to procedure is enacted and goes into effect, it must

ern and regulate the proceedings." *Sutherstruction*, Section 482.

inciple, indeed, seems to be that alterations dways retrospective, unless there be good Where, for instance, the defendant pleaded small sum that the jurisdiction of the court ay by a court of Request Act, and that act the plea, but before the trial it was held as entitled to judgment." *Endlich on the tatutes*, Section 286.

, the general rule seems to be in accordance hat statutes pertaining to remedy, *i. e.*, such rse and form of the proceedings for the enght, but do not affect the substance of the ncced, and neither directly nor indirectly for the enforcement of the right, are retroapply to causes of action subsisting at the ge." *Idem*, Section 287–288.

ffaras, et al., 15 Fed. Rep., 147, Judge Hamtutes which are remedial will be given a unless they direct to the contrary. Where, f Congress enlarges the jurisdiction of the ll be considered to apply to cases pending at the passage of the act, unless excluded cessary implication from the language of the

Respectfully submitted,

J. R. McINTOSH,

Counsel for Defendant in Error.

Office Supreme Court U.S.
FILED
NOV 10 1900
JAMES H. McKENNEY,
Clerk.

McIntosh v. R. R. Co.

Nov. 2, 1900.

IN THE

t of the United States.

ber Term, 1900.

No 64.

RAILWAY COMPANY,

AINTIFF IN ERROR,

VS.

GRAPH-CABLE COMPANY,

ENDANT IN ERROR.

IENT BY J. R. McINTOSH,

Defendant in Error.

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of Lou
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APH-CABLE COMPANY,

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endant in Error.

NOVEMBER 2d, 1900.

pared an argument in behalf of the cause, which I will read. It is not , in the language of the Supreme case of the *Postal Telegraph-Cable* nn., p. 58, in speaking of the statutes condemnation proceedings by tele- railroad companies in that State,

ıte was auxiliary to the act of Congress,
d in the construction of telegraph lines,
government the use of the same for pos-
er purposes,' approved July 24th, 1866;"
ument which I will submit now is auxil-
tofore filed in this cause.

the cause was instituted by authority of
3 of the Code of North Carolina, for the
ın easement along and upon the right of
Railway Company through North Caro-
in and operate a telegraph line thereon.
e North Carolina Code provides that any
hartered in North Carolina or any other
right to construct, maintain, and operate
ong any railroad or other public highway
t such lines shall be so constructed as not
er the usual travel on such railroads or

rizes the telegraph companies to contract
such right and privilege.

ires that said telegraph companies shall
over the lands, privileges and easements
d corporations, &c., upon making just
making of just compensation is the only con-

ides that, when said telegraph company
ight by contract or agreement, upon giv-
it may file its petition before the superior
into or through which said easement,
e, exists, or, if the right claimed be over
or *right of way* to or through more coun-
hole right or controversy may be heard
one county into or through which said
way extends, and that the petition shall
e or easement claimed, the owners of such
and must be sworn to.

The only av
the petition a

First, That
Second, Tha
the right soug
Third, Tha

Section 201
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Court, shall b
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Section 201
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Section 201
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evidence befo

The petitio
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The petitio
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named therei
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to the Superi
April, 1898, te
defendant.

On the day
presented to t
Railway Comp
Circuit Court
North Carolin

The petitio
of the parties
$2,000, &c.

y this statute to be made in

pany is incorporated.
pplication therefor to secure
greement.
ty for costs.
y of the petition, with notice
be presented to the Superior
ndant at least ten days prior
the court.
procedure in such cases shall
9) for condemning lands for

mmissioners are not required
rest their finding from the

mpany strictly and minutely
ute, as will be seen by refer-

e clerk of the Superior Court
the easement or right of way
through the several counties
ugh the county of Guilford,
petition would be presented
l county on the 22nd day of
e same, was served upon the

when the petition would be
was presented to the court, the
and bond for removal to the
s for the Western District of

ed a diversity of citizenship
unt in controversy exceeded
he Telegraph Company filed

with the clerk of the Superior Court, alleged that the rail
right of way was 100 feet in width, that the telegraph
would be constructed by planting poles 26 feet in length,
in the ground, 4 feet from the outer edge of the railroad
of way, and that the railroad track was 4.8 wide: h
it is apparent to the court from this averment in the pet
that the poles, when erected, would be 21 feet above the gr
and 43 feet 8 inches from the outer edge of the track, a
tance of more than twice the length of the poles. And, i
event the Railway Company should express a desire fo
location of said line at some other point on the right of
than as designated, or at any time, should desire to change
location of its tracks, or to build new or additional tracks,
tracks, turn outs, turn-tables, or the use of its lands for
railroad purposes, the Telegraph Company proposed to re
its lines, upon reasonable notice, at its expense, to such o
points on the right of way as might be designated by the
road Company; that it would not build its lines upon
embankments, or attach its wires to any trestle-work or bri
of the Railway Company, and that its line, when built, w
be no damage to the property of the Railway Company
impair or injure the value of the railroad right of way
railroad purposes, but that the same would be beneficial to
Railway Company; that it did not desire or seek the fe
any portion of the right of way, but only the right to constr
maintain and operate a telegraph line along and upon
railroad right of way, all the time recognizing the supe
right of the Railway Company to the entire right of way,
should be needed for railroad purposes.

Upon that record—those pleadings—the State Court o
ruled the motion for removal, for the reason, as stated in
judgment of the court denying the motion, "The court h
ing that the amount in controversy is not shown by the plead
in said cause to be as much as $2,000, and from the facts sta
in the petition of the Telegraph Company, the court is of
opinion that the amount of damages to which the Railr

mpany is entitled from the Telegraph Company is less than 000."

Then the Railway Company obtained a temporary restraining er from his Honor, Judge Simonton, of the United States cuit Court, for the Western District of North Carolina, re- ining the Telegraph Company from proceeding further in State Court, which was afterwards made perpetual, and a tion to remand to the State Court was overruled.

The Railway Company then filed a motion, containing 16 unds, which Judge Simonton styled a demurrer, to dismiss petition of the Telegraph Company, filed before the clerk the State Court, which motion or demurrer was overruled. en Judge Simonton made an order for the appointment of mmissioners to assess the damages. The Railway Company ed and procured leave to file an answer to the petition of Telegraph Company, the court in the mean time suspend- the order for the appointment of commissioners, when the egraph Company demurred to the answer, which demurrer by the court sustained, and an order made reinstating the er appointing commissioners. The Railway Company then tioned the court for leave to introduce testimony to sustain nswer, to which a demurrer had been sustained, which peti- was by the court denied. The Railway Company then tioned for writ of error, for appeal to the Circuit Court of peals for the Fourth Circuit, which was denied on the ground no final order had been made in the cause. Then the rneys for the Railway Company went before Judge Nathan f, in the City of New York, when and where he made an er, setting aside the order of Judge Simonton, and grant- a writ of error, and the cause was thus appealed to the cuit Court of Appeals, which court, composed of Judge f, as President, and Judges Morris and Brawley, sustained otion to dismiss the writ of error, which had been granted Judge Goff, for the same reason that Judge Simonton had sed it, want of jurisdiction, because no final order had n made in the cause. Judge Goff then made an order re-

instating the order for the appointmont of commissioners and directing the clerk of the Circuit Court at Greensboro to summons the commissioners, theretofore appointed by him under the order of Judge Simonton of September 15th, 1898 which was done and the commissioners, after due notice to the parties and hearing the proof adduced, assessed the damages at $10, but, before the expiration of 20 days, which, under the statutes of North Carolina, the Railway Company had for filing exceptions to the report, and before which time the court could not confirm the report of the commissioners, a writ of error was granted by the Honorable Chief Justice of this court to the Circuit Court of Appeals, with *supersedeas*, whereupon the Telegraph Company entered a motion, in the alternative either to dismiss the writ of error, for the want of jurisdiction as no final order had been entered in the cause, or to discharge the *supersedeas*, and the motion to dismiss was denied, but the *supersedeas* was discharged, so that the Telegraph Company could proceed to construct its line.

This is a brief, but correct, statement of the case.

The argument by the attorneys for the Railway Company, made in their brief filed in this cause in May, 1899, and referred to in their last brief, whereby they undertook to demonstrate that the opinion in the case of *Luxton* v. *North River Bridge Co.*, 147 U. S., 337, was not an authority for us in this case, in this: that, under the eminent domain statute of New Jersey, as declared by this court, the damages assessed were not payable upon the mere award of the commissioners, nor until after a judgment of the court affirming such award, or the verdict of the jury rendered on appeal therefrom, and that the condemning corporation acquired no right to possession, &c., until after such judgment of affirmance and the payment of the award or judgment. There is no difference whatever between the New Jersey statute and the North Carolina statute upon that point, as shown in counsel's brief, p. 40, where they quote from the opinion of the Supreme Court of North Carolina, in the case of *Telegraph Co.* v. *R. R. Co.*, 83 N. C.,

nd three other cases from the Supreme Court of North
ina, and that the order appointing commissioners was
final order, &c., in which that court held that, "*the right*
possession is given only after final judgment of confirmation,
at no appeal lies at an earlier stage of the proceeding."
their own argument, they admit that under the North
ina statute the condemning corporation—in this case the
raph Company, had no right to take possession until after
judgment of confirmation of the report of the commis-
s assessing the damages. In that I agree with them.
hey argue that, because of the statement in my brief
in this case May 22d, 1899, after the Circuit Court of
als had sustained the motion to dismiss the writ of error
ant of jurisdiction, Judge Goff made an order reinstating
rmer order of Judge Simonton for the appointment of
issioners, and directed the clerk to summons the com-
oners, upon notice to the parties, for the purpose of as-
g the damages, which was done, and the Telegraph
any immediately paid into court for the Railway Com-
the amount assessed, and at once commenced the con-
ion of its line, as authorized by section 1946 of the Code
rth Carolina, and continued said work until interrupted
supersedeas, upon the writ of error now pending in this
and therefore the order appointing the commissioners
final order.

mitting the statement in my brief to be true, and it is
it only shows that the work then and since done in con-
ing the telegraph line upon the railroad right of way
ot authorized by the order or judgment of any court.
hat does not alter or change the law of the State,
pounded by its Supreme Court. The order appealed
to this court is the order of the Circuit Court of Appeals
ssing the writ of error to the Circuit Court. That was
final order; neither was any one of the orders made by
Simonton in the procedure of the case, a final order,
all together, they do not constitute a final order.

There are no merits in the analysis by counsel of the order f October 24th, 1898, found on pages 4 and 5 of their last rief. I insist, therefore, that no final order has been made the case, and, for that reason, the writ of error should be ismissed.

Two other grounds—

I insist that this court should dismiss the writ of error, beause the cause was prematurely removed from the State to the ederal Court.

The cases cited by counsel in their brief on this point do ot apply. Because this is a special *proceeding*, and unlike rdinary suits at law. It is the exercise by the State of its overeign right of Eminent Domain. Mr. Justice Field, in is opinion in the case of *Boom Co.* v. *Patterson*, said: "this osition is undoubtedly a sound one, so far *as the act* of appro-riating the property is concerned." He furthermore said: This proceeding in the present case, before the commissioners ppointed to appraise the land, was in the nature of an inquest o ascertain its value, and not a suit in the ordinary sense of he term, but when it was transferred to the District Court by ppeal from the award of the commissioners, it took under he statutes of the State the form of a suit at law, and was henceforth subject to its ordinary rules and incidents." (Read rom pp. 25 and 26 of my brief, also from page 24, as to the tatutes of Minnesota, and page 28, section 1945 of Code of North Carolina, and from page 31, opinion of Justice Matthews n case of *Searl* v. *School District No. 2*, and cases cited by him, nd section 1946 of Code of North Carolina on page 33.)

Counsel are estopped from saying that, at the time of the iling of their petition and bond for removal, the sole question vas the amount of damages to which the Railroad Company vas entitled, not only by section 1945 of the Code of North Carolina, but by their own argument, made in their brief filed n this cause at the last term of this court, when this question vas not before this court. On pp. 19 and 20, of what they

ree with them on that point. The Railway Com-
e right, under section 1945, to answer the petition
graph Company, and, if the answer controverted
tional fact stated in the petition, it was the duty of
hear the proofs and allegations of the parties, and
in their brief, that *determines* the existence of the
demn, and, as stated in *Boom Co.* case, "until that
United States, a separate sovereignty, has no right
by any of its departments;" and in the case of
dland Ry. v. *Jones, et al.*, 29 Fed. Rep., 193, Judge
: "The right of Eminent Domain being an attribute
nty is one of those rights the exercise of which
uestioned or challenged by the courts of any other

So far the authorities are all in accord, and when
o take is asserted and adjudged, the question of
on, a matter entirely independent of the right, still
determination. * * * When the only contro-
ning to be considered is the amount of compensa-
exists a suit—a controversy—which, under the
may be removed," &c.

he Mineral Range case, 25 Fed. Rep., Judge Brown

statute for condemnation of land also provide for
om the Probate Court to the circuit court and the
an issue there, we should find no difficulty in hold-
held in that case (*Hess* v. *Reynolds*, 113 U. S., 73)
n v. *Patterson*, that the removal should be had in
Court, and not from the Probate Court."

he removal statutes, which require "the petition
or removal to be filed at or before the time when
nt is required by the local law or rule of court to
lead to the declaration or complaint" does not ap-
class of special proceedings, for the reasons stated
ion of the court just cited. When this case was

othing had been done but to file the petition for the of the sovereign right of Eminent Domain before the d the serving of notice upon the Railway Company ould be presented to the court on the 22d day of June, d before it was presented to the court, hence, before t could have passed upon the right to condemn, it was . It was at that stage a lifeless, inanimate thing, and from the womb of the State Court into the Federal e it had the life and vitality of a suit at law.

ground for dismissal of the writ of error for want of on is, that the amount involved in this controversy from the pleading, when the cause was removed, and e Circuit Court refused to remand, is less than $2,000. eadings consisted of the petition of the Telegraph y in the condemnation proceeding, and the petition of way Company to remove the cause from the State to ral Court.

tition of the Telegraph Company sets out how its line onstructed, viz: Of the best material, and upon the proved plan, with poles 26 feet long, one foot in diam- he base, planted 5 feet in the ground and four feet outer edge of the right of way, which is 100 feet d in the centre of which is located the railroad track, inches wide, with cross-arms 6 feet in length fastened top, with insulators thereon upon which the wires e strung, and there would be about 35 poles to the at where the wires crossed the track the poles would h and the wires suspended so far above the structure ailway Company as to prevent any interference with tions of the trains; that the telegraph line would be ucted and maintained as not to obstruct or hinder the el and business of the Railway Company, nor in any rfere with the operation of said company, nor with raph line now on said right of way. In the event the Company should express a desire for the location of at some other point on said right of way than as

, or desire to change the location of its tracks,
tracks or side-tracks, &c., the Telegraph
to remove its poles upon reasonable notice,
se, to such other points as may be designated
Company. That its lines would not be at-
stle work or bridges or upon any of the em-
e Railway Company, and when the line was
uld in no way damage the property of the
y, or impair or injure the value of the said
r railroad purposes, but, upon the contrary,
cial to said Railway Company and its pat-

or removal simply alleged in the usual form,
enship, and that the amount in controversy
exclusive of interest and costs. It did not
at way or what items went to make up the
to exceed $2,000, whether the Railway Com-
amaged in that sum by the construction and
he telegraph line in the manner set out in its
the easement sought by the Telegraph Com-
orth that sum to it. I presume it was upon
it was estimated, for the reason that it is a
osition that there could be no actual damages
ompany by the construction of the telegraph
er proposed in its petition, and because from
nsel they insist that the Telegraph Company
mages to the Railway Company the benefits
ve from the construction of its line upon the
way, and not what the Railway Company
ed thereby—a proposition not contended for
world but them, not sustained by any au-
diated by all the authorities, reason, justice,
y. *Sullivan* v. *Lafayette County, Miss.*, 61
6 of my brief.
a matter of law, the damages to which the
y is entitled are merely nominal, and that it

t to the court from the pleadings in the cause
as said time and again that is the test), that
controversy is less than $2,000, and for that
it Court erred in refusing to remand the cause
rt, and therefore this court should dismiss the
that the mere statement of the jurisdictional
n for removal, that the amount in controversy
loes not give this court jurisdiction, any more
ment in a petition for the removal of a cause,
ught upon a promissory note given for $100,
ration the damages are alleged to be $5,000,
r of law only $100 with interest and costs can

must take into consideration and be governed
s in the petition of the Telegraph Company,
nce, *it is the declaration in the cause: it is the*
action. And, as a matter of law, from it the court
t the amount in controversy was less than $2,000.
e principle laid down by the Supreme Court
he case of *City of Chicago* v. *C., B. & Q. Ry.*
, affirmed by this court in 166 U. S. Rep., 226,
edings of this kind as to the measure of dam-
reme Court of Illinois afterwards, in the case
al. Ry. Co. v. *Postal Telegraph-Cable Co.*, in 173
ed a judgment for nominal damages, citing its
, and the opinion of this court in same case,
pport of it.
, but every court in the Union, Inferior and
Courts and Federal Court, before which I have
tion, has promptly and unanimously held, that
nounced by Mr. Justice Harlan in the C., B. &
e measure of damages, applies to and should
ngs of this kind, wherein a telegraph company
nt of the right of way of a railroad company,
ion and maintenance of its lines.

for it is a vital one to the company I
nd has been, since I first read it, a clear
far has agreed with me.

tice Harlan, for this court, held:

he street across the railroad track did
ith the Company's use of the right of
road purposes, then its compensation
that it belonged to the court to deter-
s by which the jury were to be governed
of compensation to the owner," and,
art of Illinois well said that 'the measure
amount of decrease in the value of the
ses caused by the use for the purposes
r the purposes of a street being exer-
se of the company for railroad purposes.
mpany is to be compensated for the
o use its tracks, caused by the existence
Citing 149 Ill., 457.

itions are asserted:

pening of the street across the right of
terfere with the company's use of its
oad purposes, then the compensation

s the duty of the court to so instruct

mpany should only be compensated for
ght to use its tracks caused by the ex-
treet.

re predicated upon the principles an-
n:

the statutes of Illinois, the Railroad
of way, although, as to this particular
simple, for railroad purposes *only*, and

e right of the company to use the lands or
r as many tracks as it reasonably required
ot affected by the opening of the street in
not acquiring the fee, was necessarily sub-
f any, of the company to lay down addi-
cessary, in the proper conduct of its busi-

e contention that the Railroad Company
ual protection of the laws, in that by the
ividual property owners were awarded as
contiguous property appropriated in the
he value of their land taken, while only
ion was given the Railway Company, was
compensation was awarded to individual
asis of the value of the property actually
d to the uses for which it was best adapted
or which it was held and used, and was
used, and compensation was awarded to
ny upon the basis of the value of the thing
d by the public, the use of the company's
treet crossing. In other words, the meas-
n or damages to which the individual was
nounced by this court in the case of *Boom*
ause the individual owns his land for any
d when it is taken for a public use, he is
ure of damages stated in that case.

he Code of North Carolina, like that of
l limits the power of railroads to *purchase*,
h real estate as may be necessary for their
aintenance, as necessary to accomplish the
rporation. In other words, inasmuch as
ny holds its right of way, unlike that of
limitations, for railroad purposes only, it
, for when appropriated for that purpose
m the market. It is as completely with-

s those pure, noble women, who
urity of angels, the self-sacrificing
the veil, are withdrawn from the

e for the measure of damages to
entitled when crossed by a street,
this kind?
ssing, the railway company is sub-
more damages than when a tele-
on its right of way in the manner
great city like Chicago, its teem-
cycles, on horseback, in wagons,
d now in automobiles, and every
nce, the young and the old, the
on each other, going and coming
e right to do when opened for a
ssitates the utmost care and vigi-
employees, who conduct the hun-
of the company daily over that
ger the lives, limbs, and property
e right to cross their tracks, and,
uous and great expense, to main-
s and gate-keepers, who, like sen-
he army, must be ever watchful
ompany against incalculable dam-
their negligence. It was because
enied the Railway Company dam-
such crossing, that brought forth
on of Mr. Justice Brewer.
not put to any expense whatever,
veniencd in the least by the tele-
way.
ected by the erection of its poles,
of the poles, above ground, from
t of way being 100 feet wide, and
es in the centre of it, the poles

outer edge of the right of way, will be
, or 43 feet 8 inches from the edge of
ng 26 feet long, planted five feet in the
ove ground, leaving a distance of twice
inches. They cannot be erected upon
e line fastened to any of the trestle or
; and if, at any time, the Railway Com-
any portion of its right of way used
, it will be removed, upon reasonable
of the Telegraph Company, to such
nated by the Railway Company. Thus
right at all times of the Railway Com-
of way. Thus bringing the Telegraph
le laid down by this court in the Chi-
e opening of the street across the com-
not acquiring the fee simple title—was
the right, if any, of the company to lay
, if necessary, in the proper conduct of

nced by this court in that case was not
pon reason and justice. It is the law of
ed by the Court of Queen's Bench in
Works, 6 C. Q. B., 40. In that case
d of Works, by act of Parliament, was
a portion of a church-yard for a public
hat in the hands of the church it could
purposes; it was, therefore, practically
it was then needed for a public use, the
ereby be benefitted; that it could have
l to it, simply because the Legislature
e transferred from one public use to
saying: "When Parliament gives com-
ovides that compensation shall be made
n the property is taken for the loss he
that he shall be compensated to the ex-
his loss shall be decided by what was

the value of t
value of it to
could never ha
to him they w

The Suprem
119 Ill., 529, s
statute, or by
holds his title
of it, so that
measure of hi
demnation, wi
he is so restri

It was so he
ton, 137 Mass.
ported in 1834
applicable to c

Mr. Cook, i
934, p. 2234,
has a right, u
of way of a ra
pany are *nom*
right of way, a
telegraph compa

The Suprem
above cited, 1
tion fails to
incommode th
the petition, a
tion is not we
connection wi
tion of the lin
public use of

That court
under the wir
acquired no ri
use of the la

nd not what would be the
it. The plaintiff, as rector,
se church-yards; therefore,
ss."
in *Railroad* v. *Catholic Priest*,
vner of land is restricted by
instrument under which he
g order, to a particular use
pply it to any other use, the
re his land is taken by con-
, for the *special use* to which

10 C. B., 327; *Allen* v. *Bos-*
149. The last case was re-
not new, but old principles

k on Corporations, in sec.
Where a telegraph company
a State to condemn a right
to be paid the railroad com-
railroad company owns only a
is not interferred with by the

in the Postal Telegraph case,
further argued that the peti-
osed telegraph line will not
railroad. The allegations of
rred to, show that this objec-
ations must be considered in
e telegraph line. The loca-
the petition, shows that the
be seriously incommoded."
paces between the poles and
en, that Telegraph Company
Railroad Company from the
of the Railroad Company

remains as it was before. In that case, a judgment for n
damages was sustained, the court holding that the p
announced by this court in the C., B. & Q. case, 166
governed that case.

The Supreme Court of Tennessee, in the case of *
Ohio R. R. v. *Postal Telegraph Co.*, 46 S. W. Rep., 576, su
a judgment for nominal damages only, and held that th
ciple announced by this court in the C., B. & Q. case ap
and must govern that case. The court said: "This is
a case where the railroad is not using the space occu
the posts and wires, and when it cannot convey it to
for any purpose, in which case only nominal damages
And, approving the rule laid down by the lower cour
"This rule was no doubt adopted from the rule laid d
the Supreme Court of the United States in the case of
& Q. Ry. v. *City of Chicago*, 166 U. S. 248."

The Supreme Court of Alabama, in case of *M. & O.*
Postal Telegraph Co., 24 Southern Rep., 408, in a case a
from Mobile county, said:

"In the case before us, a very nominal amount of la
stituting right of way, is proposed to be taken—only th
of it occupied by the posts, 175 feet apart, leaving the
all other purposes unobstructed. It is really an ease
an easement, a servitude true, for which the compan
titled to some compensation under the constitution. Th
road Company, however, holds its right of way, so f
made to appear, simply for railroad purposes. Under th
of the estate that the railroad has in its right of wa
difficult to see how the damages sustained by the road
anything more than nominal. Indeed, if we might
advantages and disadvantages, a competing line would n
and reasonably appear to be an advantage to the R
Company. * * * The land constituting the right
really has no market value so long as it is used for su
poses. It has been withdrawn by the very uses of the c
from marketable lands; and, when there can be no

value of land, by reason of its use as a part of an extensive business or enterprise, its value must be determined by the uses to which it is applied, and necessarily not by any supposed market value it has," citing *I. C. R. R.* v. *City of Chicago*, 141 Ill., 500; *C., B. & Q. R. R.* v. *City of Chicago*, 166 U. S., 226, and *Lewis on Eminent Domain*, Sec. 485.

The Supreme Court of Mississippi, in the case of *M. & O. R. R.* v. *Postal Telegraph-Cable Co.*, 26 Southern R., 300, said:

"We adopt the rule as first above stated in *St. L. & C. R. R. Co. v. Postal Telegraph Co.*, 173 Ill., 534," and say: "This is undoubtedly the sound view. Mr. Justice Harlan puts the point with great clearness in the same case at page 258, 166 U. S. Compensation was awarded to the railroad company, upon the basis of the value of the thing actually appropriated by the public—the use of the Company's right of way, for a street crossing, having regard to the purposes for which the land in question was acquired and held, and was always likely to be held. In the case of individual owners, they were deprived of the entire use and enjoyment of their property, while the railroad was left in possession and use of its property for the purposes for which it was being used, and for which it was best adapted, subject only to the right of the public to have a street across it. In this there was no denial of the equal protection of the law, &c. * * * The doctrine in *Boom Co.* v. *Patterson*, 98 U. S., 402, has no application to shis case. Patterson owned his land absolutely, to be used or sold for any purposes he pleased. His use of it was not limited, as in the case of the right of way by a railroad company.

"The doctrine by Mr. Justice Harlan, for the United States Supreme Court, above, and of the Supreme Courts of Illinois, Alabama and Tennessee, is undoubtedly the only correct view, and, if the case of the *Postal Telegraph-Cable Co.* v. *Vicksburg R. R.*, 68 Miss., 314, conflicts with what is here announced, it is to the extent of such conflict, hereby overruled."

In the case last referred to, that court had applied the doctrine in the Boom case, applicable to a proceeding of this kind.

The Supreme Court of Texas, in two cases, has recently fallen into line with the current of authorities, and held, that the principle announced by this court, in 166 U. S., 226, governs proceedings of this kind. *Southwestern Telegraph, &c. Co.* v. *Gulf, C. & S. F. Ry. Co.*, 52 S. W. Rep., 106, and *Texas & New Orleans R. R.* v. *Postal Telegraph Cable Co.*, 52 S. W. Rep., 108.

Judge Beatty, for the Circuit Court of United States, for District of Idaho, rendered an opinon in a condemnation proceeding by the *Postal Telegraph Co.* v. *The Oregon Short Line Ry. Co.*, which I argued before him last May, in which he says:

"As to the rule of assessing damages, the adjudications differ, but that fixed by the United States Supreme Court must be followed, which seems, by the *Chicago, Burlington, etc. R. R.* v. *Chicago*, 166 U. S., 224, to be the amount of decrease in the value of the use of the railroad right of way, for railroad purposes, caused by the use of plaintiff of such right of way for its telegraph poles and lines." (Not yet reported.)

Lewis on Eminent Domain, Sec. 462, says: "Just compensation, as used in the Constitution, means a fair and full equivalent for the loss sustained by the taking for public use." Citing a long list of authorities. The same author, in Section 269, says: "A telegraph line constructed on the right of way of a railroad is no material interference with its use for railroad purposes."

The question I submitted in the beginning of my argument on this point, why the rule announced by this court in the case of *C. B. & Q. R'y Co.* v. *City of Chicago*, does not apply in a case of this kind, has been answered by every court which has had occasion to pass upon the measure of damages to which a railroad company is entitled when a portion of its right of way is taken for the use of a telegraph line. No

hat, but they all hold, as did this court in the C. B. & e: "If the opening of the street across the railroad did not unduly interfere with the company's use of the of way for legitimate railroad purposes, then its com-tion would be nominal."

d they all hold, as well as Lewis on Eminent Domain, Cook on Corporations, that there cannot be any interfer-with the operation of the railroad's trains on its track, the telegraph is constructed in the manner set out in the on, and the Supreme Court of Illinois, in 173 Ill., says: se allegations in the petition are in the nature of stipu-s, to which the petitioner binds itself. Such stipulations been held valid by this court," &c.

e court should take judicial knowledge of the fact, that would be no interference with the "usual travel," in the age of the North Carolina statute, of the railroad by the ruction of the telegraph upon the railroad right of way, e manner proposed. It no more interferes with it than en walking upon the sidewalk of Pennsylvania Avenue ere with the running of the street cars. As the Supreme of New York has taken judicial notice of the fact that ng hours are from 10 A. M. to 2 P. M. (115 N. Y., 250); ity lots in New York city have a certain depth, and the ings on corner lots often cover the whole lot (85 Hun., that a certain town is in a certain county (131 N. Y., that a trolley car can be stopped in less than 100 feet . Y. Supp., 441); that streets in New York run in a cer-direction, and begin and end in certain places (27 N. Y. , 304); that the pole and front wheels of a wagon may at right angles to the wagon (41 N. Y. Supp., 102).

e Supreme Court of Alabama, in the case before cited, that court, says: "Common knowledge teaches that there ple space on the hundred feet of the railroad's right of for two or more telegraph lines, without obstructing the nd ample use of it for railroad purposes,"

espectfully submit, therefore, that under these authorities,

a legal proposition, it was apparent from the pleadings, hen the cause was removed, that the amount in controversy was s than $2,000; hence, the Circuit Court had no jurisdiction, d erred in overruling the motion to remand, and the writ of ror for that reason should be dismissed, the ex parte affi- vits, filed after the cause was removed, to the contrary not- thstanding. Those affidavits, nor any of them, are compe- nt testimony.

In their argument upon this jurisdictional point they quote om their answer, filed several months after the removal of e cause, and after the court had refused to remand it. The egations of that answer, so made, did not, of course, consti- te a part of the pleading at the time of the removal, upon hich alone the court was to determine the jurisdictional ques- on of the amount involved in the controversy. They quote d rely upon the averment in their answer that the telegraph ne, as proposed in the petition, could not be constructed so not to interfere with the usual travel, &c., because they ege that in many places the right of way is too narrow to rmit it.

The answer to all that is, that the condition made in the atute that the line shall be so constructed as not to interfere th the usual travel, is a condition subsequent, like the con- tion in thousands of deeds of conveyance made to railroads r right of way, on condition that the railroad company will tablish a depot on said lands, that is the consideration to the antor for the supposed enhancement of the value of the mainder of his lands. The railroad company accepts the eds upon that condition, and then is bound to establish the pot as proposed; otherwise, the consideration for the con- yance fails, and a court of chancery would cancel and annul e conveyance, or the railroad company would be liable at w in damages to the grantor for breach of contract. The ilroad company could not establish the depot until it first ceived the conveyance. The establishment of the depot was condition subsequent. So it is, the telegraph could not es-

line until it had the authority of court, and the
n of the line as provided for by statute is a condi-
uent.

if the court please, in their answer they do not state
v is the right of way at such places, so that the court
e of it; but content themselves with such slipshod
this: "That such right of way varies greatly in
ndry points covered by the condemnation proceed-
so narrow that to erect a telegraph line thereupon
npracticable, or, at least, would greatly imperil the
ion of the defendant's railroad, and grossly obstruct
he usual travel thereupon, and that it will not be
construct and maintain a line of telegraph upon its
set out in said petition in such a manner as not to
hinder the usual travel upon defendant's railroad."
re do they say how wide the right of way is at such
v places, whether 20 feet, or 40, or 80 feet, or how
ch strips, whether 50 feet, or 100 feet, or 1,000 feet,
urt might judge of the reasonableness of the allega-
or that reason it was demurrable.

e bear in mind the principle announced by this court
of *C., B. & Q. Ry. Co.* v. *City of Chicago*—that the
on would be *nominal*, if the railroad's use of its
e not unduly interfered with for railroad purposes
ssing of the street; that the measure of compensa-
amount of decrease in the value of the use for
rposes caused by the use for the purposes of a street,
ised jointly with the use of the company for rail-
oses; that a railroad company can acquire land,
voluntary purchase or otherwise, only for railroad
that the only question to be determined by the jury
at extent was the value of the company's right to
d for railroad purposes unduly diminished by open-
et across it; that the right of the Railway Company
ight of way for as many tracks as it reasonably re-
its business was not affected by the opening of the

he city not acquiring the fee, was necessarily subject
right, if any, of the company to lay down additional
f necessary, in the proper conduct of its business; and
vas the duty of the court to determine these legal prin-
y which the jury were to be governed in fixing the
of compensation to the owner—in other words, virtu-
nstruct the jury, as a matter of law, that the Railroad
ıy was entitled to only nominal damages; and, in view
act that the petition of the Telegraph Company for the
way shows upon its face, conclusively, that the line so
ted would not interfere in the least with the operation
ailway's trains, the only purpose for which it held its
way, all the time recognizing the prior right of the
company to its right of way for railroad purposes; and
damages to which the railway company would be en-
ere merely nominal, as stated by Cook on Corporations,
vis on Eminent Domain, and as stated by all the courts
e opinion in the C., B. & Q. case was handed down,
principle therein announced for the measure of dam-
ntrols and governs in cases of this kind, which is such
l, reasonable, and legal conclusion that no court, in-
superior, has disputed it, I insist that this court should
hold that, from the record, the pleadings at the time
val, which consisted only of the petition of the Tele-
Company for right of way, and the petition of the
Company for removal, that the amount in controversy
s than $2,000, hence the Circuit Court acquired no
ion.

counsel, in order to avoid the force and effect of my
nt on this point, say, that when the court passed upon
rruled the motion to remand the cause there were four
s filed by the Railway Company not replied to by the
ph Company, that the amount in controversy exceeded
nd afterwards, the answer, which was sworn to alleged
$60,000. For reply to that I have this only to say:
sdictional question as to the amount involved in the

ld have been determined by the court from ecord, *when* the cause was removed, as stated ge 6 of their last brief, where they say: "As tood, the Federal Court, not the State Court, jurisdiction to determine the question of fact viz: *the amount involved*," which is sustained es there cited by them; hence, the *exparte* ter the cause was removed, should not have by the Circuit Court, and were not, as will be pinion of Judge Simonton, overruling the d. Besides, those affidavits, as I will show, they were not worth the paper upon which n. The substance of them is as follows:

filed by the Railway Company in the Circuit ges to which the Railroad Company is entitled

D. Myers, which says in his opinion the right legraph Company upon the Southern Rail- in North Carolina is worth more than $2,000.

M. R. Talcott is that, in his opinion, the sum awarded to the Southern Railway as compen- t of way ought, in his judgment, to be largely , exclusive of interest and costs.

ank S. Gannon is that, in his opinion, the t of way to the plaintiff, if condemned for the ff, would certainly be largely more than $10 t the damage sustained by the defendant, by ndemnation and use of its right of way by erection and maintenance of the poles and right of way, thereby interfering with de- trol of its right of way, would be more than s therefore of the opinion that the amount in s proceeding is more than $2,000.

R. Sully says he has no hesitation in saying,

xpert, that the sum justly due to the Southern
npensation for the proposed condemnation of
ay throughout the counties and between the
very greatly exceeds in value the sum of $2,000,
terest and costs. He furthermore says that, if
s proposed in the petition of the Telegraph
ove its lines when the ground occupied by it
ed by the Railroad Company, if it could be em-
order of the court condemning the property
se, tend to lessen the otherwise intolerable em-
bstruction and damage to a railroad company,
nforced occupancy by the Telegraph Company
way, yet it will not seriously modify the state-
ion above given. Affiant then states that the
Telegraph Company pays in excess of $2,000
of 193 miles for the right of way of railroads
is connected.

t therefore, that these experts made their affi-
al principles, and do not state upon what basis
opinions are formed; hence such opinions are
all the authorities as incompetent and not evi-
e measure of damages to which the Railway
titled by reason of the construction of the tele-
ne manner proposed in its petition in this cause.
practice in the Circuit Court in civil cases is,
and the evidence in a cause is such that the
l bound to set aside any verdict of the jury for
defendant, it is the duty of the court to take
the jury, or peremptorily instruct the jury to
aintiff or the defendant, as the case may be.
le, I submit, if the case as to the measure of
een tried by a jury, it would have been the duty
pon the pleadings—the record when the cause
o have instructed the jury peremptorily to find
damages, because, as a matter of law, upon the
lway Company was entitled to only nominal

matter of law, this court will deter-
y of the Circuit Court to have done,
nvolved in the controversy.

ntiff in error, now, upon the home-
sure they consider the paramount is-
is, the sacred right of trial by jury,
th amendment to the Constitution of
ections 648 and 649 of Rev. Stats., and
of North Carolina, providing for the
by the commissioners, must give way
ev. Stats., because to adopt the State
sistent with the terms, defeat the pur-
ect of legislation by Congress: there-
intment of commissioners by the Cir-
s the seventh amendment, in conflict
id. This argument is in conflict with
in this cause, the rulings of this court,
ecisions of State Supreme Courts.

estion settled, it is that: "A constitu-
to a jury trial is satisfied, if the jury
eal. The primary assessment may be
or viewers." 87 Ala., 328; 52 Ark.,
a., 257; 39 Am. & Eng. R. R. cases,
d., 143; 9 Iowa, 594; 7 Md., 500; 1
ay. 530; 57 Mo., 599; 113 Mo., 390;
557; 66 N. H., 181; 45 N. J. Eq.,
5; 4 Ohio St., 167; 7 S. Dak., 310;

de of North Carolina provides as fol-

oners) shall report the same (their
eh here means the clerk) under their
ain twenty days after filing the same,
said land may file exceptions to said
ermination of the same by the court

k) either party to the proceedings may ap-
at term, and thence after judgment to the
The court or judge on the hearing may direct
nodify or confirm the report, or make such
ises as to him shall seem right and proper.
ny, at the time of the appraisal, shall pay
n appraised by the commissioners, then and
said company may enter, take possession of,
ds, notwithstanding the pendency of the ap-
e final judgment rendered on said appeal or
But if the court (meaning the judge) shall
the land, or any portion thereof, to the use
then and in that event, the money paid into
thereof as shall be adjudged, shall be re-
mpany. And the company shall have no
l lands not condemned, but shall surrender
the same on demand, to the owner or own-
agent or attorney. And the *court* or *judge*
ver and authority to make such orders, judg-
s, and issue such executions and other pro-
cessary to carry into effect the *final* judgment
proceeding. The costs in this proceeding
either party as the judge or court in his dis-
dge."

ons of this statute, either party has twenty
file exceptions to the report of the commis-
the determination of such exceptions by the
y may appeal to the court *at term*. Thus
to this time the whole proceedings are to be
erk, who is, under sections 132 and 251 of the
Code, to be considered the "Court" in such
m his ruling appeal may be had to the court
ere is a jury, and where all questions of fact
by a jury. Section 405, provides that "the
beginning of the court swear such of the
f the original panel to try *all civil cases.*"

If issues, both of law and of fact,
aised before the clerk of the supe-
the case to the civil issue docket
he ensuing term of the superior

Trial by jury may be waived by the
of fact, in actions on contract, and
rt in other actions in the manner
appear at the trial. (2) By written
orney, filed with the clerk. (3) By
minutes.
t foot of this section.)
extraordinary care the right of trial

gain declared, that in proceedings
urely statutory, the Circuit Court
of the statutes of the State from
ed.
he case of *Southern Telegraph Co.* v.

only, and every court which takes
ment is limited in its powers by the
t can act. * * * * The courts
removal of the proceedings from
othed with no greater power in the
the State would have possessed if
preserved."

, in the case of *Belmont Bridge* v.
S., 287, went so far as to hold that
the Circuit Cout to appeal a cause
r of the Circuit Court appointing
contrary to all precedent of this
Supreme Court of West Virginia,
e had been removed, had held, in
an appeal to the Supreme Court

ten from such order, the court stating
g was made alone in order to conform
Court. The court said: "The judg-
been considered as so far final as to
; and if the Supreme Court of a State
n inferior court of a State to be final,
it in any other light in exercising an

on proceedings in which a contrary
in the case like *Luxton* v. *North River*
he proceeding was conducted, not by
ute, but by act of Congress, which
d conform as near as may be to the
he condemnation of land for railroads,
y at variance with the act of Congress,
e proceedings were instituted, and so
ey were not pursued.

main, Sec. 311, says that some consti-
mmon-law jury of twelve, and others
nay be ascertained by commissioners,
lve, but, in the absence of an express
it is not a matter of constitutional
ay of our constitutions were adopted,
n England and America to ascertain
er agencies than a common-law jury.
2 that in those States where a jury
by express provision of the Constitu-
ury trial may be had on appeal. And
at in the absence of a special consti-
egislature may prescribe such mode as
g the compensation; that a court or
jury is an impartial tribunal, so are
egrity and fair intelligence forming a

of the present Constitution of North
75, is: "In all controversies at law

respecting pr
the best secu
main sacred

That same
of the Consti
istration of G
the Constituti

In the fund
the charter o
amended by t
111 it is provi
of any freema
out a jury of
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trial of the is

Section 22
vides, that, "
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except the iss
enactment of
17 of the C
superior court
the granting
as shall be pr
them shall be
when there, t

Heretofore,
their several
ramifications
their technic
that the court
guide and con
issue, they "

node of trial by jury is one of
the people, and ought to re-

be found in Sec. 19 of Art. I
ed under the military admin-
as copied from Section 14 of
State by Congress in 1776.
on of Carolina, authorized by
, framed by John Locke, and
y in the year 1669, in Section
e, whether civil or criminal,
any court of judicature with-
well understand, therefore,
oic people, who at Charlotte,
oclaimed the first declaration
ritain, should, in the statute
ove shown, provide for the
a jury.
he present Constitution pro-
shall be, at all times, open
ss within their jurisdiction,
g a jury." That is but a re-
onstitution of 1868. Section
s, that, "The clerks of the
tion of the probate of deeds,
ry, &c., *and such other matters*
issues of fact joined before
uperior court for trial." And
be tried by a jury.
for the plaintiff in error, in
ause, and throughout all the
roceedings, made tedious by
shouted for, and demanded
tutes of North Carolina as its
en they raise their *paramount*
st that the statutes of North

Carolina be ignored. Just as they now do, in their effort
evade the force and effect of the point I make, that the ca
was prematurely removed, when they said in one of th
former printed briefs: "In short, our view is that a cond
nation proceeding, of the character of that under investigati
substantially embraces two separate and successive proceedin
the fact of which concern only and must determine the ex
ence of the right to condemn, and the second is limited to
subsequent inquiry as to the amount of compensation to
paid for property adjudged in the first proceeding to be lia
to condemnation." Page 19 of fifty page brief for plaintif
error, filed October, 1899. But in their last brief, since I h
raised that point, and insist upon the doctrine there announ
by them, as authority for the position that the case was p
maturely removed, they entirely ignore it. The truth is, th
have written too much—they have written a book, and I n
appreciate the exclamation of Job: "Oh, that mine ene
would write a book!"

The provisions of the Constitution of North Carolina, abo
quoted, and the statutes of the State pursuant to them,
only sustain my contention on the point that the cause
prematurely removed from the State Court, but they and
citations from Lewis on Eminent Domain, from the opini
of this court and other authorities, clearly demonstrate th
there is no merit in their argument that the statutes of No
Carolina are in conflict with the 7th amendment to the Con
tution, and sections 468 and 469 of the Revised Statutes.

Counsel for plaintiff in error say they have not appeal
from the order of the Circuit Court of Appeals, dismissing
writ of error, by which the cause was appealed to that co
from the Circuit Court, nor from the order of the Circuit Co
for the appointment of commissioners, but from the order
that court of October 24th, 1898, sustaining demurrer to th
answer, and refusing to hear testimony to sustain the answ
to which the demurrer has been sustained. For a compl
answer to their complaint on that score, I respectfully re

the court to the opinion of his honor, Judge Simonton, upon that matter, at page 56 of the record. But they go into an analysis of the order of October 24th, which I will answer very briefly.

They say that was a final order, because by it the court—

1. "Determined that North Carolina statutes are in force under which the telegraph company may condemn a right of way for its purposes upon the property of the railroad."

For reply to that, I say the court was correct in that, as shown by his opinion at page 56 of record, and my brief recently filed, from pages 55 to 65, and from 87 to 89 inclusive.

2. "Prohibited testimony showing the value for telegraph purposes of the property condemned."

In that the court was correct, for now that proposition is not contended for by anyone else in the world but the counsel for the plaintiff in error, and is repudiated by every court that has uttered a word, or text-writter who has written a line upon that question. I beg to refer the court to page 86 of my brief on that point.

3. "Determined that the condemned right of way for telegraph purposes may be unfixed, shifting, and changing as a location."

I deny the charge, and respectfully refer the court to the petition of the Telegraph Company, record, pp. 3, 4, 5, and 8, 19 and 20, and the opinion of the Supreme Court of Illinois, 173 Ill., 508, saying: "These allegations in the petition are in the nature of stipulations to which the petitioner binds itself." Brief, p. 50.

4. "Determined that the entire condemnation may be had in one proceeding upon a strip of land, much of which is held in fee simple (by the railway) belonging to a single owner, and extending through twelve different counties, a distance of nearly two hundred and fifty miles."

In that the Circuit Court did not err, as shown by section 2010 of the North Carolina Code, the opinion of the court at page 56 of the record, and from pages 54 to 65 of my brief upon the merits.

5. "Determined upon demurrer that every defence set up in the answer of the Railway Company is without merit, even though it was proved by conclusive evidence."

In that the court did not err, for reasons hereinbefore argued, and those stated in the opinion of the court, p. 56 of record, and in my brief on the merits.

6. "Refused to hear proof as required by Section 1945 of the Code of North Carolina."

In that the court did not err, because the answer made no issuable fact. The only jurisdictional facts necessary under Section 2010 of the Code to be alleged were, 1, that the Telegraph Company was incorporated; 2, it had failed to secure by contract the privilege sought; 3, that it had given security for costs, all of which were averred in the petition and not denied by the answer.

7. "Determined without proof conditions precedent to condemnation under the North Carolina statute."

I deny there were any conditions precedent to the right to condemn. The condition stated in section 2007 of the Code, "that the lines of telegraph shall be so constructed and maintained as not to obstruct or hinder the usual travel on such railroad or other highway," is a condition *subsequent*, as shown in my brief, p. 69, under the head of "The Statutory Provision a Condition Subsequent," and under the head of "Necessary Averments in a Petition of a Telegraph Company," p. 72.

8. "Delegated to its clerk the power of selecting and appointing commissioners to assess damages, and authorized its clerk to preside over such commissioners."

hat the court did not err, because that was a duty that ained to the clerk of the Superior Court of the State, as from the sections of the Constitution, and the statutes, ne decisions of the Supreme Court of North Carolina, before quoted, and as shown in counsel's last brief (p. der section 103 of the Code, the clerk is expressly given , "To preserve order in his court, and to punish con-," and, as stated by Chief Justice Waite in *Southern aph Company* v. *E. T. Va. & Ga. R. R.*, 112 U. S., 306: remedy is statutory only, and every court which takes ction for its enforcement is limited in its powers by the under which alone it can act. * * * The courts of nited States, on the removal of the proceedings from the e court, were clothed with no greater power in the es than the courts of the States would have possessed, r jurisdiction had been preserved."

Delegated to its clerk powers vested in the court and in urt only."

t point has been fully answered.

"Determined that the Telegraph Company may con-take possession of, construct its lines upon, exercise ion over, and use the lands of the Railway Company ny before the entry of any further order, by the court."

hat the counsel are mistaken. The order determines no hing, as conclusively shown from opinion of Supreme of North Carolina, cited in their brief: "That the right possession is given only after final judgment or con-on, and that no appeal lies at an earlier stage of the dings."

nnot be a matter of conjecture or speculation with the whether the order of the Circuit Court of October 24, vas a final order or not, or whether, as argued by coun-had the effect of a final order; because the record in use is proof positive that it was neither. It shows there

e at least six orders made in this cause subsequent to it, it:

) Order of November 9th, p. 75 of record, refusing writ rror, and reinstating order of September 15, 1898, for the ointment of commissioners, and ordering the clerk to sum- them and proceed to assess the damages.

) Order of Judge Goff, made November 29, 1898, setting e the order of Judge Simonton, and granting a writ of r and *supersedeas* from the Circuit Court to the Circuit rt of Appeals.

) Order of Circuit Court of Appeals by Judge Goff, March 899, dismissing the writ of error before that allowed by with costs. It is, "It is ordered and adjudged by this t that the writ of error sued out in this cause be and the e is hereby dismissed."

) The mandate of the Circuit Court of Appeals to the uit Court, ordering that the cause be dismissed, and com- ding as follows:

You therefore are hereby commanded that such *further edings* be had in said cause by way of execution, as, ac- ing to right and justice and the laws of the United States, t to be had, the said writ of error notwithstanding." rd, p. 1001.

Order of Judge Goff, May 3, 1899, granting a writ of and *supersedeas* from the Circuit Court of Appeals. Re- p. 1001.

Order of this court discharging the *supersedeas* upon the of error.

sides several orders of the clerk of the Circuit Court.

Burlington, &c. v. *Simmons*, 123 U. S., 52, this court held a decree establishing the right of a junior mortgagee to m from a prior mortgagee, but not determining the amount

ay, or the amount due on the mortgage, was inter-

almira, 10 Wheaton, 502, that a decree for restitu-
sts and damages was held not to be final, as the
ere yet to be ascertained.

v. *Vasques*, 11 Wheaton, 429, where a decree for
s allowed on a libel, and commissioners appointed
the amount of damages, it was held that no appeal
ntil the commissioners reported, for it was not a

ta v. *Kelbourn*, 150 U. S., 524, a decree which re-
e to a master to state an account between the par-
which a further decree is to be entered, was held
nal.

of law being that a judgment or decree, to be final
rpose of review, must terminate litigation on the
hat an affirmance by this court, the court below
nothing to do but to execute the judgment or de-
rendered. Such was the rule stated by this court
v. *Brinkerhoff*, 106 U. S., 3.

ng that rule, we find in *Life & Fire Insurance Co.*
k v. *Adams*, 9 Pet., 571, it was held, though the
he cause have been substantially decided, while
ough formal, remains to be done, this court can-
on the subject.

horities, I respectfully submit, effectually do away
ntention of counsel that the order of the Circuit
tober 24th was a final order, because much was
one, and much was done in the progress of the
hat.

sel for the Railway Company say the Telegraph
s no right to construct its lines upon the railway
. I reply that it has, not only under the statutes
rolina, but also under the act of Congress, entitled
aid in the construction of telegraph lines, and to
e government the use of the same for postal, mili-

d other purposes," approved July 24th, 1866, Rev.
63–5269, which declares that "any telegraph company
anized, or which may hereafter be organized under
of any State in this Union, accepting the provisions
t, shall have the right to construct, maintain, and op-
es of telegraph over and along any of the post roads
nited States which have been or may hereafter be de-
ch by act of Congress, provided they shall be so con-
and maintained as not to interfere with the ordinary
such post roads," and Section 3964 declares all rail-
hich are now or hereafter may be in operation to be
ds.

n 5269 declares that "telegrams between the several
ents of the government and their officers and agents,
transmission over the lines of any telegraph company
has been given the *right of way*, &c., shall have pri-
r all other business at such rate as the Postmaster-
shall fix."

n 5267 provides that "the United States may, for
ilitary, or other purposes, purchase all the telegraph
operty and effects of any or all companies acting under
isions of the act of July 24th, 1866, entitled, etc., at an
d value, to be ascertained by five competent disinter-
rsons," &c.

n 5268. "Before any telegraph company shall exer-
of the powers or privileges conferred by law, such
shall file its written acceptance with the Postmaster-
of the restrictions and obligations required by law."
ction 5269, a penalty of not less than one hundred
and not more than one thousand dollars, is imposed
y telegraph company, having filed its acceptance of
isions of that act which refuses or neglects to transmit
h telegraphic communications as are provided for by
or by the provisions of Section 221, title, "The De-
t of War," authorizing the Secretary of War to pro-
taking meteorological observations at the military

er points of the interior of the Continent, and
e on the northern lakes and seaboard of the
rce of storms.

that, by accepting the provisions of that stat-
ph Company is bound hand and foot by the
permitting the Postmaster General arbitrarily
e rates to be paid by the Government for such
ent and bind itself to sell, at the option of the
entire property, at a price to be fixed by five
ever valuable its investment may have become
ers, by reason of the great skill, indefatigable
perb management and conduct of its affairs,
ng itself to the severe penalties imposed in
Surely, it would not have done it, but for the
ration that would accrue to it by such accept-
sideration was mainly the right to construct,
erate its lines upon all post roads. Section
at such right is given when the Telegraph
cepted the provisions of the act. It certainly
of Congress that it should, in consideration
efits to the Government, exercise that privi-
lege accorded to it by the act. The right of
graph-Cable Company to construct, maintain,
nes upon the right of way of the railroads is
ll the rights guaranteed to it by that act, for
mon *knowledge* of the fact that there are but
ph lines in the United States—the Western
stal—and the former has its lines upon virtu-
ads in the country, under an exclusive con-
ourt has so often declared void, and the Postal
ly compete with it unless it is given the same

with its *seventy-six* millions of population, en-
nceivable enterprise, with that courage, energy
given it, though yet in its infancy, a controll-
the great powers of the earth, is too large,

too diversified, and the competition in trade too
e telegraph company. The public interest demands
Congress intended by that act to give to all tele-
anies the same privileges, as was declared by this
xcola Telegraph Company v. *Western Union Telegraph*
U. S., 1. If it did not, or, if the courts refuse to
rights to it, then the valuable consideration secured
Government in being given priority for the trans-
s messages, at a low rate fixed by the Postmaster
ich in ten years, I am sure amounts to more than a
dollars less than is paid by the public for like
olly fails. It is not the policy of this great gov-
demand the services of its agents, without paying
ensation for the same. It is not done in any other
was it intended by Congress in the passage of
t it should be done in this instance. The Tele-
pany, as has been declared by this court, is the
e government. I do not claim the right of the
Company to construct its lines upon the right of
oad companies without paying them just compen-
I do say that just compensation in such cases is
nages, for the reasons stated in the case of *C., B.*
. v. *Chicago*, 166 U. S., 226, and for the reasons
the courts whose opinions are cited in this argu-
ey are not damaged in any sum by it. And I do
right to construct, maintain and operate telegraph
ll post roads is guaranteed to it by Congress, and,
the Supreme Court of Louisiana in *Postal Tele-*
ny v. *Morgan, La. & Tex. B. & S. Co.*, 49 La. Ann.,
ep., 183). "*The act of Congress is paramount so far*
n of the right of way is concerned, and the (State)
s auxiliary to it, and provides for the method of
on and compensation."

the railroads in the United States accepted their
constructed their roads after the act of Congress
1866; of course, subject to the conditions im-

as said by this court in the Chicago
company laid its tracks through the
to the condition, not, it is true, ex-
implied, that new streets of the city
xtended across them as the public con-
under such restrictions as might be
"

ies, like the telegraph companies, are
The breath of life was blown into their
Alone by the grace of a benificent law,
have their being, which is upon the
ublic benefit, the railroads in the trans-
and freight from one section of the
e telegraph companies in the transmis-
ews, by which orders are given for the
es and navies, commerce is given life,
d, and we are in truth made one great,
mmunity. These two mighty agencies
joint heirs of the law; hence the law
om says the railroads must share their
telegraph for the public good; that
hall have the right to construct their
way of the railroads. Just so, they are
o interfere with the ordinary travel
urse, Congress knew from common
n be so constructed, and the limitation
against such careless or reckless con-
hat would interfere with the operation
is common knowledge that a telegraph
railroad right of way much less than
e manner proposed in the petition of
in this case, would not interfere with
ad trains.

an agent of the Government, and as
to construct its lines upon the right of
en though there were no statutes in

xpressly or by necessary implication author-
nnation of the right of way of railroads for
es, under the decision of this court in the case
States, 91 U. S., 375, the Telegraph Company
ny statute of the State, by which just compen-
scertained. The court said: "The investment
of the Treasury with power to obtain the
ation, without prescribing the mode of exer-
gave him also the power to obtain it by any
competent to adjudge a condemnation."
thermore, in that case, said Congress might
the tribunal and mode of ascertaining just
The mode might have been by a *commission*,
been referred expressly to the Circuit Court.